COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2010AP2445
2011AP186

Cir. Ct. No. 2001FA285

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE MARRIAGE OF:

SARA M. SANDBERG,

PETITIONER-RESPONDENT,

V.

JOHN P. DONAHUE,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. This divorce proceeding between John Donahue and Sara Sandberg is before this court for the fifth time. Donahue, pro se,

challenges circuit court decisions concerning motions regarding modification of custody and physical placement, child support, and sanctions. We affirm. We also deny motions by each party for sanctions on appeal.

¶2 Donahue first argues that the circuit court erroneously exercised its discretion[1] by failing to grant his request to modify custody and primary physical placement based on Sandberg's alleged anger issues. He argues, "[t]he record doesn't support the trial court's findings. The Trial court tries to shift blame to Donahue and ignores Sandberg's long standing anger issues."

¶3 Custody and physical placement decisions are committed to the sound discretion of the circuit court. *See* ***Bohms v. Bohms***, 144 Wis. 2d 490, 496, 424 N.W.2d 408 (1988). We will affirm the court's discretionary decision as long as it represents a rational decision based on the application of the correct standard to the facts. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). We search the record for reasons to sustain the circuit court's discretionary decision. ***Steiner v. Steiner***, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687 N.W.2d 740.

¶4 The circuit court correctly applied the legal standard under WIS. STAT. § 767.451(1)(b) (2009-10).[2] Although the court found there was a

[1] Donahue uses the phrase, "abuse of discretion." We have not used the phrase "abuse of discretion" since 1992, when our supreme court replaced the phrase "abuse of discretion" with the phrase "erroneous exercise of discretion." *See, e.g.*, ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

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

substantial change of circumstances regarding one child, it is apparent that its primary consideration was the best interests of the children.

¶5 The circuit court's finding that the modifications proposed by Donahue were not in the best interests of the children was an appropriate finding. The court's decision was the product of rational decision-making and none of the court's findings are clearly erroneous. *See* WIS. STAT. § 805.17(2). The court's determination regarding custody and primary placement was a proper exercise of discretion.

¶6 Donahue challenges the court's exclusion of expert testimony from psychiatrist, Dr. Marc Ackerman. Donahue argues that Ackerman "could have testified to the long term effects of anger on a child." A circuit court's discretionary "decision to admit or exclude expert testimony will not be upset on appeal if it has a reasonable basis and was made in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Watson***, 227 Wis. 2d 167, 191, 595 N.W.2d 403 (1999) (citation omitted).

¶7 The circuit court found that Ackerman had not met either child, or Sandberg, whose alleged anger issues were at issue. Furthermore, Ackerman had reviewed records selected by Donahue to show Sandberg in a poor light and to show Donahue in a positive light. The court also concluded that it would be judicially inefficient to delay the proceedings to fax Ackerman additional documents. The court reasonably determined that Ackerman's testimony would not assist the court, and to the extent the testimony was relevant, it was outweighed by confusion of the issues and considerations of undue delay and waste of judicial resources. The court's findings are more than sufficient to uphold its discretionary decision to exclude Ackerman's testimony.

¶8 Donahue challenges the tax exemptions related to the children. In the preceding appeal of this case, Donahue argued that the court commissioner had awarded him one of the tax exemptions, but the circuit court's order was silent on the matter. *See* ***Sandberg v. Donahue***, No. 2007AP2719, unpublished slip op. at 6 (WI App Dec. 11, 2008). We concluded it would be appropriate for the circuit court to address the issue on remand when it took up a conceded error in calculation of child support. ***Id.*** at 4, 6. Donahue now argues that the circuit court erred after remand by awarding each party one minor child to claim as a tax exemption, and alternating the exemption, because there is only one minor child.

¶9 Donahue complains about the fairness of the court's order. Donahue argues that "when the time comes where there is only one exemption," he should receive it. However, his argument is undeveloped and lacks citation to legal authority. We will not consider unsupported and undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992); ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶10 Another issue concerns the circuit court's utilization of the guardian ad litem in the event of future filings by Donahue. The court stated it was "going to implement some rules, if you will, to try and lessen the litigation because I think this will improve the lives of both your children." The court stated that it would not allow any motions to change custody or placement until the time limit for the current appeal had expired. If the court's decision was appealed, the motion could not be filed until the matter "comes back from the Supreme Court." The court ruled that if Donahue brought a motion for change of custody or placement after that, "the motion is first sent to [the guardian ad litem] with a check for $600, and [the guardian ad litem] will make a recommendation to me if it's in the best interests of the children to have that motion heard and decided."

¶11 Donahue suggests that the circuit court's order allows the guardian ad litem "to decide on whether a motion should be heard or not." Donahue misrepresents the court's order. The guardian ad litem is merely being asked to report to the court on whether the motion is in the children's best interests, which is appropriate when a court is dealing with a motion to modify custody and placement. *See* WIS. STAT. § 767.407(4). Here, the court is placing the issue earlier than normal in the process, in order to make sure it is considered carefully before proceeding in a manner that is not in the best interests of the children. Given the extreme history of litigation and animosity in this case, we see no defect in the court's procedure in this regard. The court properly exercised its discretion by continuing the appointment of the guardian ad litem beyond the entry of the final order, and specifically by stating the scope of the guardian ad litem's responsibilities. *See* § 767.407(5). In addition, the court properly exercised its discretion by compensating the guardian ad litem at a rate the court deemed reasonable. *See* § 767.407(6).

¶12 Donahue argues that Sandberg's April 10, 2009 and December 7, 2009 contempt motions "must be reversed and voided" due to improper service. However, Donahue concedes that he was never found in contempt. Donahue was therefore not prejudiced. Nevertheless, Donahue insists that "after the trial court found Donahue wasn't in contempt, it ordered him to pay close to $3,000 in orthodontic fees for the April 10, 2009 Contempt Motion and hundreds of dollars in the December 9, [sic] 2009 Contempt Motion." Donahue suggests the court lacked authority to make these decisions, but again fails to provide adequate record citations or legal authority. We will not search the record for evidence to support a party's arguments. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App

240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. Arguments inadequately supported by citation to legal authority will not be considered. ***Pettit***, 171 Wis. 2d at 646.

¶13 Donahue argues that the circuit court improperly failed to comply with our directions concerning child support issues upon remand of the prior appeal. Donahue's arguments are difficult to discern. Donahue takes umbrage with the court's rulings and rehashes old arguments, but we conclude that Donahue has not sufficiently demonstrated how the court allegedly erred and we decline to sift through the record for evidence that might support his contentions. We also note that Donahue attempts to suggest circuit court bias, but fails to support this allegation. Donahue does not convince us that the court's child support decisions upon remand constituted an erroneous exercise of discretion.

¶14 Donahue also argues that the circuit court improperly denied a WIS. STAT. § 802.05(3) sanctions motion against Sandberg and her former attorney. However, the court concluded Donahue provided "no explanation whatsoever" as to why he waited almost two years to make this § 802.05 motion. With respect to § 802.05, we made clear in ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 290-92, 528 N.W.2d 502 (Ct. App. 1995), that prompt action is necessary in seeking sanctions for alleged violations of the statute. We conclude that the court in the present case properly exercised its discretion in denying Donahue's motion as untimely.

¶15 Finally, Sandberg seeks costs and attorney fees for a frivolous appeal. Donahue responds with a motion seeking sanctions under WIS. STAT. § 802.05 "for filing a frivolous motion." In order to find an appeal frivolous, the entire appeal must be frivolous. *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶10, 277 Wis. 2d 21, 690 N.W.2d 1. Donahue's motion is without merit

for reasons we have explained, and as to Sandberg's motion, we cannot readily conclude that every argument Donahue makes is completely void of arguable merit. We also deny Donahue's § 802.05 motion for failure to satisfy statutory requirements.

By the Court.—Orders affirmed.

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