COURT OF APPEALS DECISION DATED AND FILED

February 11, 2004

Cornelia G. Clark
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 No. 02-2604

Cir. Ct. No. 97-PA-21

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE PATERNITY OF EMILY C.B.:

DAVID B.,

PETITIONER-APPELLANT,

V.

STEPHANIE C.S., N/K/A STEPHANIE C.R.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. David B. appeals from an order transferring primary placement of his daughter, Emily C.B., to her mother, Stephanie C.S. He argues that there was insufficient change of circumstances to support the

modification of primary placement and that the circuit court erroneously admitted evidence from a mediation session and records from David's treating therapist. We conclude there was sufficient evidence to support the circuit court's determination and that there was no error in the admission of evidence. We affirm the order.

¶2 Emily was born January 2, 1997. On January 30, 1997, Emily was left in her father's care. A stipulated judgment of paternity was entered May 6, 1998, providing for joint legal custody, primary placement with David, and periods of alternate physical placement with Stephanie conditioned on the completion of an AODA program, counseling, and the nonconsumption of drugs or alcohol during periods of placement.

¶3 On December 16, 1998, Stephanie filed a motion to modify placement and reopen the paternity judgment. As grounds, she asserted that she was not previously represented by counsel, did not understand the provision in the stipulation extending the application of WIS. STAT. § 767.325(1)(a) (2001-02)[1] from two to eight years, and that the long travel distance made short periods of placement impractical. Litigation of this and other motions continued over the

[1] WISCONSIN STAT. § 767.325(1)(a) establishes a cooling off period by preventing modification of placement within two years of the original determination unless there is substantial evidence that modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child. *See* ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 764, 498 N.W.2d 235 (1993). After the two-year period, modification may be made when the court finds that it is in the best interest of the child and there has been a substantial change of circumstances. Sec. 767.325(1)(b).

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

next few years.[2] Although the stipulation's extension of the two-year period mandated by § 767.325(1)(a) was declared void as a violation of public policy, Stephanie's motion was never fully resolved by order of the court.

¶4 On April 20, 2001, Stephanie moved to transfer primary physical placement to her under WIS. STAT. § 767.325(1)(b). After resolution of disputes regarding psychological exams, the matter was tried over ten different days in February and March 2002. The circuit court found that David was antagonistic and unbending towards Stephanie and would not support a healthy relationship between daughter and mother. It found that relationship to be crucial and necessary to the child's best interest and that placement with Stephanie would foster a healthy relationship with both parents and provide predictability and stability for the child. The court ordered primary placement transferred to Stephanie on a gradual schedule but completed in full by the beginning of the 2002 school year.

¶5 David's opening salvo is that Stephanie's December 1998 motion did not plead a basis for reopening the judgment under WIS. STAT. § 806.07 or for modification of placement within the first two years under WIS. STAT. § 767.325(1)(a). This argument has no place in this appeal because in the circuit court the parties agreed that the posture of the case was to review placement after

[2] On January 19, 1999, David filed a motion to quash the order for a custody and physical placement investigation. Although in July 1999, the parties reached an agreement increasing weekend placement with Stephanie, on September 22, 1999, the circuit court entered an order again referring the case to family court counseling for a custody investigation. In October 1999, Stephanie moved for a temporary order increasing placement and setting up a holiday schedule. The guardian ad litem moved for an order requiring both parties to submit to a psychological examination. Awaiting the psychological report, trial dates were set and adjourned.

the passage of more than two years. We need only be concerned with the application of § 767.325(1)(b) with respect to Stephanie's April 2001 motion for a change of primary placement.

¶6 To modify primary placement under WIS. STAT. § 767.325(1)(b), two conditions must exist: modification is in the best interest of the child and a substantial change in circumstances has occurred. ***Licary v. Licary***, 168 Wis. 2d 686, 694, 484 N.W.2d 371 (Ct. App. 1992). Whether modification is in the best interest of the child is a discretionary determination by the circuit court that will not be disturbed unless the circuit court erroneously exercises that discretion. ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 764, 498 N.W.2d 235 (1993). It remains a truism that custody modifications are "peculiarly within the jurisdiction of the trial court, who has seen the parties, had an opportunity to observe their conduct, and is in much better position to determine where the best interests of the child lie than is an appellate court." ***Id.*** at 765 (citation omitted).

¶7 David first argues that the passage of time alone does not constitute a substantial change of circumstances.[3] He implies that the passage of time here merely reflects Stephanie's continued sobriety and a change in her marital status. He equates those changes as merely changes in economic circumstances and marital status, which WIS. STAT. § 767.325(1)(b)3 specifically lists as insufficient to meet the standards for modification. David ignores that the passage of time here also demonstrates the real effect of the placement arrangement on the child's ability to establish a meaningful relationship with her mother. The circuit court

[3] To the extent that David contends that Stephanie's April 2001 motion and supporting affidavit itself were inadequate to even put forth an issue for trial, we reject it. David did not raise that issue in the circuit court.

noted that while David adhered to the letter of the stipulated placement arrangement, he was not able to support the spirit of the agreement—to foster a relationship with the child's mother. Indeed David's own conduct in failing to properly explain to the child who her mother was, and his refusal to refer to Stephanie as the child's mother, created confusion for the child. Expert testimony supports the finding that the child was affected by David's unwillingness to acknowledge Stephanie as her mother. The finding that a substantial change of circumstances had occurred was not based solely on changes in Stephanie's economic circumstances or marital status.

¶8 Next, David contends that the circuit court did not properly link what qualified as a substantial change in circumstances and how a transfer of primary placement would be in the best interest of the child. We could not disagree more with David's assessment of the circuit court's decision. The court made specific findings relative to the need to place the child in a home where her relationship with her mother could be enhanced. It further found that placement with Stephanie would also serve to foster the child's relationship with both parents since Stephanie, unlike David, recognized the child's need to have an ongoing relationship with both parents. These findings overcome the presumption in WIS. STAT. § 767.325(1)(b)2.b that continued placement with the parent with whom the child resides for the greater period of time is in the best interest of the child. David's contention that the circuit court failed to analyze the fifteen factors in WIS. STAT. § 767.24(5),[4] is without merit. In the bench decision, the circuit court touched upon each of those factors and explained why or why not the factor had

[4] WISCONSIN STAT. § 767.325(5m) provides that in all actions to modify physical placement orders, the court shall consider the factors under WIS. STAT. § 767.24(5).

an impact on the decision. The record demonstrates a proper exercise of discretion in modifying primary physical placement.

¶9 At trial, a tape of a mediation session from civil litigation between David and his older daughter was admitted into evidence.[5] David contends this evidence was inadmissible under WIS. STAT. § 904.085(3), which renders oral or written communications relating to a dispute in mediation inadmissible. Evidentiary rulings, particularly relevancy determinations, are left to the discretion of the circuit court and will not be upset on appeal unless the court erroneously exercises its discretion. ***Shawn B.N. v. State***, 173 Wis. 2d 343, 366-67, 497 N.W.2d 141 (Ct. App. 1992). We will affirm the circuit court's discretionary ruling if it is supported by a logical rationale, is based on facts of record and involves no error of law. ***Id.*** at 367.

¶10 WISCONSIN STAT. § 904.085(4)(e) provides: "In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally." The tape was admissible under this section. A manifest injustice could be found to exist because the mental stability of both parties was the principal issue in dispute and the tape shed light on David's mental functioning as being quick to anger. Also, David had supplied the tape to the court-appointed

[5] The civil litigation involved a dispute over a car. The existence of the tape was brought up during testimony of David's older daughter about her relationship with her father and whether the tape would reflect that the daughter was afraid to tell her father about her marriage.

psychologist and should not be permitted to selectively disclose its contents. We conclude it was not error to admit the tape.

¶11 David's final issue is that the circuit court improperly admitted session notes from his treating therapist because those notes were confidential under WIS. STAT. § 905.04. The circuit court found that David had waived the privilege because he called his therapist, who had also treated his daughter Emily, as a witness. We agree that David should not be allowed to call the therapist with respect to Emily's treatment and selectively invoke the privilege. Although the treatment periods did not overlap, the therapist's knowledge and treatment of David could not be fully separated from treatment of Emily. Naturally, the therapist would use information learned during treatment of David in her dealings with Emily. Confidentiality required by § 905.04(1)(b) was lacking. Additionally, David's mental condition was at issue in this case. Section 905.04(4)(c) provides that there is no privilege when the patient relies upon his or her mental or emotional condition as an element of the claim or defense. This exception additionally supports the circuit court's admission of the therapist's notes.[6]

By the Court.—Order affirmed.

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

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[6] We may affirm on grounds different than those relied on by the circuit court. ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).