COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 2010

A. John Voelker
Acting 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. 2009AP729 **Cir. Ct. No. 2005FA250**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PETITIONER,

ELIZABETH J. HARDER,

PETITIONER-APPELLANT,

V.

LEE J. NELSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Polk County: ROBERT RASMUSSEN, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Elizabeth Harder appeals an order regarding physical placement. Harder argues that because the circuit court granted her motion to dismiss Lee Nelson's motion to modify placement of their minor son, a motion for contempt associated with her placement enforcement action was never fully heard. Harder also claims the court improperly granted an injunction against her ex-boyfriend, Phil Slate. We affirm.

¶2 This case stems from Nelson's belief that the couple's son was being physically abused by Slate. As a result, Nelson kept the child for one week during Harder's week of placement. Harder thereafter filed a "Motion To Enforce Judgment and For Contempt." This motion sought enforcement of the physical placement order in effect at the time, additional periods of placement to replace those denied by Nelson, and contempt. Nelson subsequently filed a motion to modify placement to award him primary placement of the child.

¶3 A hearing was set for September 11, 2008. Between the pretrial conference and the date of the hearing, the parties stipulated that Nelson did not deny he kept the child for the week that would have been Harder's placement. Based upon that stipulation, the circuit court determined at the hearing that it would take testimony on all motions simultaneously but Nelson would have the burden of going forward on his motion. After the conclusion of Nelson's evidence, the court granted Harder's motion to dismiss the motion for modification of placement, finding Nelson failed to meet his burden of proof. The court also found that Nelson did not intentionally and unjustifiably disobey a court order. However, as an equitable remedy, the court granted Harder additional

placement to replace the time denied by Nelson.[1] Finally, the court enjoined Slate from further contact with the child. Harder now appeals.

¶4 The modification of physical placement lies within the sound discretion of the circuit court. ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992). We will affirm a determination on placement modification as long as it represents a rational decision based on the application of the correct legal standards to the facts of record. *See* ***id.*** at 530-31.

¶5 Harder argues the circuit court erred by failing to hold a hearing within thirty days of her motion to enforce the existing placement order. *See* WIS. STAT. § 767.471(5).[2] Nelson responds that there is no evidence in the record he was served personally as required by WIS. STAT. § 767.471, although Nelson concedes his attorney admitted service. We need not reach this issue because we conclude Harder effectively agreed to an extension of the thirty-day hearing requirement.

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[1] The court also found the child was abused while in Harder's care, but that Harder did not knowingly allow the child to be abused.

[2] WISCONSIN STAT. § 767.471(5) provides in relevant part as follows:

> Enforcement of physical placement orders.
> …..
> (5) Hearing; Remedies. (a) The court shall hold a hearing on the motion no later than 30 days after the motion has been served, unless the time is extended by mutual agreement of the parties or upon the motion of a guardian ad litem and the approval of the court.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶6 When the circuit court scheduled the hearing for September 11, 2008, Harder failed to object that the hearing was scheduled beyond thirty days from service of her motion. Harder points to correspondence dated July 30, 2008, confirming it was counsel's understanding that the court was to hear multiple motions. Harder objected to Nelson's motion being heard at the same time as her motion, but Harder did not object to the hearing date. At the hearing, Harder renewed her objection to the motions being heard simultaneously, but did not object to the hearing being held more than thirty days after service of the motion. We therefore conclude Harder effectively agreed to an extension beyond thirty days after service of the motion.

¶7 Harder also argues that generally a party cannot obtain a modification of a placement order as part of an enforcement action under WIS. STAT. § 767.471. However, Harder mischaracterizes Nelson's motion for modification of the placement order as a "response" to her enforcement action. Here, the circuit court explicitly stated at the commencement of the hearing that it would be "switching gears and going right to this motion to change placement." The court then determined that it would "take evidence on all three of [the motions] simultaneously." Contrary to Harder's perception, the court did not consider Nelson's motion as part of Harder's § 767.471 enforcement action. The court also stated at the hearing that it was unaware of authority that required the court to consider the motions in the chronological order in which they were filed. Harder provided no citation to legal authority at the hearing, or in her briefs to this court, to support an argument that the court could not proceed directly to Nelson's

motion to modify placement or consider the motions simultaneously.[3] We will not abandon our neutrality to develop arguments. ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶8 Harder also argues that after the circuit court granted her motion to dismiss the motion for modification of placement, the court made findings of fact and conclusions of law concerning her contempt motion without providing her an opportunity to be fully heard. Nelson responds that Harder made a strategic decision to move for dismissal after the close of Nelson's evidence and, but for her own successful motion, she could have proceeded to present evidence. Harder does not reply to this argument and we deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶9 Harder also insists the circuit court erred by enjoining Slate from further contact with the child. Nelson responds that Harder lacked standing to bring this issue as she was not the aggrieved person because the injunction was not issued against her. Nelson further asserts Slate was the aggrieved person with standing to appeal; however, he failed to appeal the order in a timely manner. Harder again fails to reply to these arguments and the issue is therefore deemed conceded. *See* ***id.***

[3] Harder cites for the first time in her reply brief, ***Bernier v. Bernier***, 2006 WI App 2, 288 Wis. 2d 743, 709 N.W.2d 453. We will not consider this authority raised for the first time in the reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). In any event, ***Bernier*** does not support the proposition that the court could not consider the pending motions simultaneously.

By the Court.—Order affirmed.

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