COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1013 **Cir. Ct. No. 2011CV1454**

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

IN THE MATTER OF THE CHANGE OF NAME OF AUSTIN DIGGS:

AMANDA WIESELER,

PETITIONER-RESPONDENT,

V.

JAMES DIGGS,

APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. James Diggs, pro se, appeals an order granting a name change for his child under the age of fourteen. Diggs argues the circuit court was biased, Diggs was entitled to the same procedural safeguards as in a

termination of parental rights (TPR) case, and the court erroneously determined Diggs' consent was not required for the name change. We reject Diggs' arguments and affirm.

BACKGROUND

¶2 Diggs was confined in prison throughout the proceedings in this case. Amanda Wieseler, his ex-wife, filed a form petition[1] for name change regarding their four-year-old son on September 16, 2011. Several days later, the circuit court responded:

> You have filed a Petition for Change of Name concerning (your son).
>
> If (your son) were 14, he could petition in his own right. For persons under 14, petitions must be filed by both parents; a guardian if both parents are dead; or the mother alone, but only if a non-marital child and if the father's paternal rights are terminated.[2] A copy of the statute ([WIS. STAT.] § 786.36) is enclosed. There may be concern about going ahead unless the father joins in the petition.
>
> Please indicate if you wish to proceed to hearing. You may wish to consult with a lawyer about the matter.

¶3 On October 6, Wieseler filed a form CV-460 Notice and Order for Name Change Hearing, which indicated a hearing was scheduled for November 30. Eleven days later, Wieseler filed an affidavit of service indicating

[1] *See* Wisconsin Records Management Committee form CV-455, 10/10 Petition for Name Change (Minor Child under 14).

[2] As we discuss later, this information was inaccurate because it omitted the fourth, and applicable, category of permissible petitioners. *See* WIS. STAT. § 786.36(1m).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Diggs was served copies of the Petition and the Notice and Order for hearing on October 14. Diggs responded to the court by letter and a form CV-480 Response of Non-Petitioning Parent to Name Change of Minor Child Under 14. Diggs indicated he objected to the name change, had neither abandoned nor failed to assume responsibility for his son, and wished to appear at the scheduled hearing.[3] In the letter, Diggs requested that the court forward a copy of his response to Wieseler, because pursuant to Wieseler's request, the prison forbade Diggs from contacting Wieseler.

¶4 On November 14, Diggs sent the court a follow-up letter indicating he had not received any response regarding the scheduled hearing and again stating his desire to appear. One week later, the court responded:

> Your letter dated November 14 … was received …. It does not disclose on its face that a copy was sent to the petitioner. As such it is an ex parte communication and could not be considered at least until the petitioner is apprised and has an opportunity to be heard. A copy will be forwarded by the Court. In the future, be sure that communications to the Court are forwarded to the petitioner.
>
> The next opportunity to address these concerns will be at the hearing on November 30 ….

Although the letter included a signature block for the court assigned to the case, it was signed via an ink-stamp by a different judge, with the indication it was signed "for" the assigned court. Diggs responded with a letter that was received on November 28. Essentially, Diggs restated the information and concerns expressed in his prior letters.

[3] Diggs indicated he preferred to appear in person, but he also provided a prison phone number for the court to arrange a telephone appearance.

¶5 The hearing convened as scheduled on November 30, with Wieseler present, but no appearance by Diggs. Following the hearing, the court ordered another hearing on January 30, 2012. The order observed Diggs objected to the name change and Wieseler "stated a purpose to proceed with a single parent petition under WIS. STAT. § 786.36(1m)(a) and § 786.36(1m)(b) and to respond to any showing by the father that he has not abandoned the child or failed to assume parental responsibility." The order also indicated Wieseler had filed a number of documents and copies would be provided to Diggs. Finally, the order set a deadline for additional written filings in advance of the hearing, indicated Diggs would have the opportunity to "address specific showings … that [he] has not abandoned the child … or failed to assume parental responsibility …," and stated the court would arrange for Diggs to appear at the hearing by telephone.

¶6 At the January 30 hearing, Wieseler was represented by counsel. At the outset, the court ruled that the various rights associated with a TPR proceeding were inapplicable in a name change case. Both parties had the opportunity to present evidence and argument, and the court essentially walked Diggs through the factual history by questioning him. Following the parties' presentations, the court observed, "Well, … the overarching factual circumstances are not very much in dispute." The court then discussed the facts and, ultimately, determined Diggs failed to demonstrate he had not failed to assume parental responsibility. Consequently, the court concluded Diggs' consent was not required, and granted Wieseler's name change petition.

¶7 After the hearing, Diggs filed several motions for reconsideration and requests for a copy of the written order. Following some appellate proceedings, the circuit court vacated and reentered the order. Diggs now appeals.

DISCUSSION

Objective bias

¶8 Diggs first argues the circuit court was objectively biased. "The right to an impartial judge is fundamental to our notion of due process." ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. We presume a judge has acted fairly, impartially, and without bias; however, this presumption is rebuttable. ***Id.*** Whether a circuit court's partiality can be questioned is a matter of law that we review independently. ***Id.***, ¶7.

¶9 Objective bias can exist in two situations. The first is where there is the appearance of bias. ***Id.***, ¶8. "[T]he appearance of bias offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. Thus, the appearance of partiality constitutes objective bias when a reasonable person could question the court's impartiality based on the court's statements. ***Id.***, ¶26. The second form of objective bias occurs where there are objective facts demonstrating the trial judge in fact treated the defendant unfairly. ***Goodson***, 320 Wis. 2d 166, ¶9. Diggs contends both types of objective bias exist here, for eight reasons.[4]

¶10 Diggs first contends the court initiated improper ex parte communication with Wieseler when it sent the September 2011 letter responding

[4] Diggs does not, however, explain which events constitute which type of objective bias.

to Wieseler's petition. Diggs argues the letter improperly provided legal advice and a copy of the statute and invited further ex parte communication by soliciting a response. We reject this basis for bias for multiple reasons. To begin with, the court could respond only to Wieseler because the form document she used did not provide an entry for naming other parties. Thus, at the time of its letter, the court had no knowledge of Diggs' identity or contact information. Second, the form document already identified the applicable statute on its face. Third, to the extent the court attempted to explain the statute, it did so incorrectly and, if anything, to *Wieseler's* prejudice. The letter recited only the three categories for requesting a name change that Wieseler did not satisfy, while omitting reference to the fourth category, which was applicable. *See* WIS. STAT. § 786.36(1)(a)-(c), (1m) (allowing a one-parent name change unless the nonpetitioning parent proves he or she did not abandon, or fail to assume parental responsibility for, the child). Additionally, the letter suggested the petition would fail unless the father joined it. Finally, the solicitation for further communication was not improper. It was merely a request that Wieseler respond and indicate whether she wished to nonetheless proceed to a hearing. As Diggs acknowledges in his brief, a court is permitted to initiate ex parte proceedings for scheduling or administrative purposes. *See* SCR 60.04(1)(g)1.

¶11 Diggs next argues the court was biased because it denied a posttrial relief motion that argued the September 2011 letter was improper. Diggs argues the court erroneously exercised its discretion because its only rationale for denying the motion was that there was "no basis to grant the relief requested on the ground asserted." However, an erroneous exercise of discretion does not alone establish bias. Additionally, even assuming the court erred by failing to set forth its reasoning, we have already determined that the letter failed to demonstrate bias.

¶12 Diggs' third assertion of bias is that the court erroneously exercised its discretion by failing to rule on Diggs' motion to appear at the November 30, 2011 hearing.[5] Diggs contends the court "failed to explain why [it] ignored, and effectively denied, Diggs' motion to appear." At the hearing, the court observed that Diggs had requested to appear, but that until it had seen "all these filings today, I really didn't know what issues might be joined … [or] whether Ms. Wieseler would have a purpose to proceed in light of the more usual concerns with only one parent signing a petition …." The court continued, "So given those circumstances, … I'm not sure we even could have on the notice we had—the court not being in session last week, I'm not sure we could have arranged for Mr. Diggs to be here in any event." Thus, although the explanation occurred in Diggs' absence, the record reflects the court did explain why Diggs' appearance was not obtained for the November 30 hearing. Moreover, as we discuss below, this argument fails to acknowledge that the court declined to address substantive matters at the hearing and scheduled a new hearing, at which the court secured Diggs' appearance.

¶13 Diggs next argues the court exhibited bias because the November 30 hearing permitted Wieseler to gain procedural and tactical advantages. Diggs first contends Wieseler would have proceeded pro se at the hearing if Diggs appeared, as she did not retain counsel until the rescheduled hearing. This argument is

[5] Within his discussion of this argument, Diggs also complains of the letter "admonishing" him for ex parte communication, despite Diggs' prior letter explaining why he was not forwarding documents directly to Wieseler. First, we disagree with Diggs' characterization of the letter as an admonishment. Additionally, the court did accept Diggs' filing, and forwarded a copy to Wieseler just as Diggs wished. Further, the judge who signed the letter was merely acting in Judge Michael Gage's absence, and likely had not viewed Diggs' prior letter. Thus, Diggs' argument within an argument—that the court was engaging in ex parte communication with Wieseler, but admonishing Diggs for the same—fails.

misplaced; it does not demonstrate Wieseler obtained any advantage at the hearing. Diggs next argues he was deprived of the opportunity to object to the thirteen exhibits Wieseler filed at the hearing. However, the court did not review the exhibits or make any rulings based on them. Rather, the court indicated it would forward Wieseler's extra copies to Diggs so he would have an opportunity to review and respond to them. Because he received his copies prior to the rescheduled hearing, Diggs suffered no prejudice based on the filings. Finally, Diggs asserts the court provided guidance to Wieseler at the hearing, but Diggs was deprived of the same. Diggs cites the court's statement that "I don't want there to be any misunderstanding about the way things should work—in a proceeding such as this." That statement, however, was presented in the context of the court's observations that Diggs was entitled to review and respond to Wieseler's filings, that it was the court's obligation to secure Diggs' appearance, and "we need a hearing where [Diggs] can participate and assert his position …." Clearly, Diggs suffered no prejudice from the court's affirmation of his due process rights to appear and respond. Further, the court's order following the hearing informed Diggs he would have the opportunity to present his case at the next hearing. Thus, he was apprised of the case's track.

¶14 Diggs' fifth assertion of bias is that the court waited until the rescheduled hearing to address and deny Diggs' requests for representation, a continuance, a jury trial, and substitution of judge. Diggs further asserts he was "blindsided to learn that he was in the middle of a trial on January 30, 2012." Diggs does not, however, specifically address any of his purported requests. Rather, he merely contends that because he was unaware that "trial would be occurring the same day," he was "pitiably prepared." We reject Diggs' argument. Any lack of understanding was not the court's fault. The order informed Diggs

that he would have the opportunity at the hearing to present his case concerning failure to assume parental responsibility and abandonment. Moreover, at the hearing, the court assisted Diggs with the presentation of his case, posing appropriate questions to Diggs to elicit both his arguments and view of the relevant factual history.

¶15 Diggs' next assertion of bias is that the court failed to provide a timely copy of the final order, despite Diggs' numerous requests, which indicated he needed a copy in order to appeal.[6] The alleged failure to receive the order ultimately resulted in a dismissed appeal, and then a remand from the supreme court. At that point, the circuit court observed the record suggested a copy of the final order had been sent to Diggs, but because of his assertions to the contrary, it was appropriate to vacate and reenter the order, thereby reestablishing Diggs' right to appeal. The better practice would have been for the court to simply forward a copy of the order to Diggs immediately upon request. However, given the court's observation that it appeared a copy was sent, and the court's ultimate withdrawal and reentry of the order, this assertion of bias is weak.

¶16 Diggs' seventh assertion of bias is that the court erred when, upon reentering the order, it failed to amend it to include Wieseler's home address, as opposed to the post office box previously identified. Diggs' amendment request was based on WIS. STAT. § 806.01(1)(b), which provides, "Each judgment shall specify the relief granted or other determination of the action, and the name and place of residence of each party to the action." The court determined the final

[6] Diggs submitted five unanswered requests for a copy of the final order from the court, between seven and seventy-seven days after its entry.

order complied with the statute by setting forth a post office box address. Regardless whether the court was ultimately correct, it offered a reasonable explanation for its determination, and Diggs fails to identify how he was prejudiced by not knowing Wieseler's home address.[7] Thus, this argument fails to support a showing of bias.

¶17 Diggs' final assertion of bias is that he was improperly deprived of the opportunity to inspect the record. Diggs requested that the entire record be either sent to the prison for Diggs' inspection or photocopied. The court denied the request, explaining it was unnecessary to reproduce the entire record because Diggs was already presented with copies of any documents pertinent to an appeal. Further, Diggs was provided a copy of the record index and could have requested any specific documents as he deemed necessary. Regardless whether Diggs is correct that he was entitled to a photocopy of the entire record at his own expense, the court offered a reasonable rationale for its decision and Diggs has identified no prejudice. Accordingly, this argument fails to support a showing of bias.

¶18 Having reviewed Diggs' eight arguments that the court was objectively biased, we are satisfied that, individually or collectively, they fail to

[7] While we need not decide the issue, we observe the statute refers to "place of residence," and not to "address." *See* WIS. STAT. § 806.01(1)(b). Thus, it might be reasonable to conclude the statute merely requires the judgment to identify the parties' county of residence.

rebut the presumption that the court acted without bias.[8] *See* ***Goodson***, 320 Wis. 2d 166, ¶8.

TPR procedural safeguards

¶19 Diggs next argues the circuit court erred when it held he was not entitled to the procedural safeguards attendant to TPR proceedings, such as the rights to an attorney and a jury trial. This argument requires interpretation of WIS. STAT. § 786.36(1m)(b). When interpreting a statute, we give its language its common, ordinary, and accepted meaning. ***Orion Flight Servs., Inc. v. Basler Flight Serv.***, 2006 WI 51, ¶16, 290 Wis. 2d 421, 714 N.W.2d 130. Additionally, we interpret the language "in the context in which it is used, in relation to the language of surrounding or closely related statutes, and [so as] to avoid absurd or unreasonable results." ***Id.*** "If the meaning is plain, we ordinarily stop the inquiry." ***Id.***, ¶17. Interpretation and application of a statute to undisputed facts presents a question of law subject to de novo review. ***McNeil v. Hansen***, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273.

¶20 The name change statute, as relevant, provides:

> If the nonpetitioning parent appears at the hearing on the petition or otherwise answers the petition and shows that he or she has not abandoned the minor, as described in s. 48.415(1)(a)3., (b), and (c), or failed to assume parental responsibility for the minor, as described in s. 48.415(6),

[8] Wieseler, by counsel, responds to Diggs' primary, twenty-eight-page argument with a three-sentence argument supported with a single record citation and no legal authority. Her argument fails to respond to the majority of Diggs' assertions of bias. Accordingly, Diggs asserts we should treat her inadequate response as a concession of the issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). However, because the record inadequately supports Diggs' assertions of bias, we deem it inappropriate to reject the presumption that the circuit court acted without bias.

> the court shall require the consent of the nonpetitioning parent before changing the name of the minor.

WIS. STAT. § 786.36(1m)(b).

¶21 Although Diggs sets forth the rules of statutory interpretation, he does not, in fact, conduct the analysis. Instead, he merely cites various TPR cases and asserts the holdings in those cases apply equally to name change proceedings. That, however, puts the cart before the horse. Diggs also argues the legislature "failed to fully consider" the issue when it revised the name change statute to include the provision at issue here. Our obligation is not to invalidate or rewrite laws based on public policy determinations; it is to interpret the laws as written.

¶22 The language of WIS. STAT. § 786.36(1m)(b) clearly and unambiguously requires a nonpetitioning parent to prove he or she did not fail to assume responsibility of, or abandon, the child, and then defines those two standards by reference. There is simply no language anywhere in § 786.36 that would support an interpretation that a name change proceeding must be treated similarly to TPR proceedings. By failing to address the statute's plain language, Diggs' argument fails as undeveloped. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).[9]

[9] Wieseler again fails to respond in any meaningful way to Diggs' argument, merely contending Diggs is confused and unable to distinguish between TPR and name change proceedings. That is not a reasonable view of Diggs' argument; he clearly understands the proceedings are not one in the same and that the only "right" being affected is the right to name the child. Diggs again replies that Wieseler therefore conceded the issue. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109. However, because statutory interpretation is an issue of law subject to our independent review, the issue is not subject to reasonable dispute, and Diggs' argument is inadequately developed, we decline to deem the matter conceded.

Application of WIS. STAT. § 786.36(1m)(b)

¶23 Finally, Diggs argues the circuit court erroneously determined his consent for the name change was not required under WIS. STAT. § 786.36(1m)(b). The court found Diggs failed to prove he had not failed to assume parental responsibility.[10] Diggs argues his consent was nonetheless required because the statute only requires the nonpetitioning parent to prove the lack of either abandonment *or* a failure to assume parental responsibility, and he argues he disproved abandonment. In this respect, Diggs does offer a reasoned, developed statutory interpretation argument.

¶24 On its face, Diggs' interpretation appears reasonable. Nonetheless, we reject it. We agree with the circuit court that, although the statute uses the terms "not" and "or," it must be interpreted as if it stated "neither" and "nor." In other words, we conclude Diggs had to prove he neither abandoned the child nor failed to assume parental responsibility. The legislature's imprecise drafting of the statute is unfortunate. However, we must interpret statutory language so as "to avoid absurd or unreasonable results." ***Orion Flight Servs.***, 290 Wis. 2d 421, ¶16.

¶25 Failure to assume parental responsibility and abandonment are two sides of the same coin. In both events, the parent and child have insubstantial relations, either because they never existed in the first instance or they failed to exist for an extended period of time. *See* WIS. STAT. § 48.415(1)(a)3., (6)(a). The manifest intent of WIS. STAT. § 786.36(1m)(b) is clear: a nonpetitioning parent

[10] Stated otherwise, the court found Diggs failed to prove he had assumed parental responsibility.

cannot block the name change of a child with whom the parent has no substantial relationship. We therefore conclude Diggs' interpretation is unreasonable.[11]

¶26 Diggs' further argument is premised entirely on the proposition that he needed only to disprove he abandoned the child or that he did not fail to assume parental responsibility. Consequently, he argues only that he established he did not abandon the child. Because Diggs fails to challenge the court's finding that he failed to demonstrate he did not fail to assume parental responsibility, the argument fails. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (failure to refute court's rationale constitutes a concession).

¶27 In any event, we are satisfied that such an argument would have failed. The court set forth appropriate reasons for its determination, which was supported by the record. Specifically, the court held:

> In this proceeding, unlike a termination of parental rights proceeding, it's his burden to show essentially that he has assumed parental responsibility in a substantial way, and there's two main strikes against him in establishing such proof.
>
> One is the actions taken to put himself in prison. Shortly after his release from jail, he embarked on accumulating a number of violations of his probation which could reasonably be expected to put himself in a position where it would be nearly impossible to establish a meaningful parental relationship.
>
> And then once that was established, the actions taken in the court's view themselves are limited and are compatible

[11] Wieseler fails to respond to Diggs' "or" versus "neither/nor" argument, and Diggs again argues the matter was therefore conceded. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109. However, because statutory interpretation is an issue of law subject to our independent review and we view Diggs' interpretation as unreasonable, we decline to deem the issue conceded.

> with the kind of disregard that went along with getting himself revoked.
>
> So under these circumstances in finding a failure to show the absence of the failure to assume parental responsibility, his consent is not required.

¶28 Finally, we observe that at several points in his brief, Diggs asserts it was Wieseler's burden to establish Diggs' failure to assume responsibility and/or abandonment. That position lacks merit. WISCONSIN STAT. § 786.36(1m)(b) plainly states it is the nonpetitioning parent who must "show[] that he or she has not abandoned … or failed to assume parental responsibility …."

¶29 No WIS. STAT. RULE 809.25(1) costs allowed. Wieseler's response brief—comprising a total of three pages of argument, including headings—was substandard and of little assistance to the court.

By the Court.—Order affirmed.

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