COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP629 **Cir. Ct. No. 2004FA1503**

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

IN RE THE PATERNITY OF Y. K. S.:

CHI-RACE R. WILLIAMS,

PETITIONER-RESPONDENT,

V.

JESSE SCHWORCK,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. This appeal concerns a travel restriction ordered by the Dane County Circuit Court as part of its decision to modify the legal custody

and physical placement of Y.S., a child of Jesse Schworck and Chi-Race Williams. The restriction at issue prohibits Schworck from traveling to any country that is not a signatory to the Hague abduction convention. Schworck had previously traveled internationally with Y.S. to nonsignatory countries to visit areas of religious importance to the Rastafarian faith, to which Schworck subscribes.

¶2 Schworck argues that the circuit court ordered the travel restriction sua sponte and, as a result, he had no meaningful notice of the restriction and was unable to prepare a defense against it. He further argues that the circuit court had insufficient evidence to order the travel restriction. Finally, Schworck argues that the travel restriction infringes on his religious freedoms; therefore, the court erred when it denied him a hearing on the issue and when it failed to apply strict scrutiny analysis in crafting the restriction. We disagree and for the reasons that follow, we affirm the circuit court.

BACKGROUND

¶3 Jesse Schworck and Chi-Race Williams are the parents of Y.S. In 2009, the circuit court granted sole legal custody and primary placement of Y.S. to Schworck. In February 2012, police arrested Schworck on drug related charges and Y.S. was removed from his care. As a result, a Child in Need of Protective Services (CHIPS) petition was filed and an order in that case placed Y.S. in Williams's temporary care. In February 2013, with the CHIPS order nearing its expiration, Williams filed a motion asking the court to change its 2009 order to grant her sole legal custody and primary physical placement.

¶4 Circuit Court Commissioner Patricia Crowe granted Williams's motion and awarded her sole legal custody and primary physical placement of Y.S. Schworck filed a petition for a de novo hearing. Subsequently, Rachel

Caplan was appointed as Guardian ad Litem (GAL) for Y.S. The case proceeded to trial.

¶5 At trial, the circuit court heard testimony regarding Schworck's religious beliefs as they relate to his parenting of Y.S. and prior trips he had taken with Y.S. It is undisputed that Schworck is a practicing Rastafarian and that he has traveled internationally with Y.S. Schworck testified that he and Y.S. traveled to Kenya on two occasions to visit religiously significant areas and participate in religious activities.

¶6 At the close of the trial, Schworck argued to the court that it was "problematic to have an order that denies out-of-country travel."[1] The GAL, however, recommended that Schworck be prohibited from taking Y.S. to any country "that is not a signatory nation to the Convention on International Child Abduction." The GAL further stated, "I think if he wants to travel with Y[.S.] to a nonsignatory nation he needs to demonstrate to the Court that he has enough stability here and can be relied upon to bring Y[.S.] back."

¶7 In a written decision, the circuit court found that there had been a substantial change in circumstances since the 2009 order. The court found that Williams has stable housing and employment, but Schworck was currently incarcerated, had sold his home, and did not have a clear plan for housing upon his release. The court then considered each factor under WIS. STAT. § 767.41(5) and ordered joint legal custody with "impasse breaking authority to Ms. Williams."

[1] Schworck also presented the court with a written summary of his position. At the end of the trial, the court gave Williams and the GAL the option to respond in writing to Schworck's written summary.

The court ordered a detailed physical placement schedule to begin upon Schworck's release from incarceration. It also ordered additional requirements, including the travel restriction:

> Y[.S.]'s passport will be held by Ms. Williams. If Mr. Schworck wants to travel with Y[.S.] internationally, he must notify Ms. Williams 30 days in advance and such international travel will not result in Y[.S.] missing school or his placement time with Ms. Williams unless she consents. Further any such international travel must be to countries that are signatories to the Hague abduction convention.

¶8 Schworck filed a motion seeking relief from judgment pursuant to WIS. STAT. § 806.07(1), in which he requested a hearing to address the travel restriction. The court denied Schworck's motion without a hearing. As to the travel restriction the court stated: "I will not reconsider my decision barring Mr. Schworck from traveling with Y[.S.] to countries that are not signatories to the Hague convention, including Kenya and Ethiopia. I have real concerns that Mr. Schworck, given that his wife is from Kenya, might choose to live in Kenya." Schworck appeals.

ANALYSIS

¶9 Schworck challenges the travel restriction on three grounds. We address and reject each of his arguments in turn.

1. The Circuit Court did not Act Sua Sponte and Schworck had Notice.

¶10 Schworck argues that the circuit court imposed the travel restriction sua sponte and, as a result, he was not placed on notice or given any meaningful opportunity to respond to the restriction. Specifically, he asserts that the plain language of WIS. STAT. § 767.451 as interpreted by ***Stumpner v. Cutting***, 2010 WI

App 65, 324 Wis. 2d 820, 783 N.W.2d 874, and ***Pero v. Lucas***, 2006 WI App 112, 293 Wis. 2d 781, 718 N.W.2d 184, prohibits the court from making changes to legal custody and physical placement on its own motion, and that the court improperly did so here.

¶11 Williams argues that the court did not act sua sponte and that her motion to change legal custody and physical placement gave the circuit court the proper authority under WIS. STAT. § 767.451, ***Stumpner***, and ***Pero*** to order the travel restriction as part of its custody and placement order. She further argues that the travel restriction was recommended at trial by the GAL and that Schworck had the opportunity to respond to that recommendation. We agree with Williams.

¶12 Whether the circuit court sua sponte ordered the travel restriction, which prevented meaningful notice that such an issue might be restricted, is a question of law that requires our independent review. *See* ***Nicholas C.L. v. Julie R.L.***, 2006 WI App 119, ¶18, 293 Wis. 2d 819, 719 N.W.2d 508.

¶13 WISCONSIN STAT. § 767.451(1)(b)1., applicable here, grants the circuit court authority to change legal custody and physical placement orders "upon petition, motion or order to show cause by a party" when certain statutory factors are met. We have previously interpreted § 767.451 and held that a court cannot change the legal custody or physical placement of a child on its own motion. ***Stumpner***, 324 Wis. 2d 820, ¶5, ***Pero***, 293 Wis. 2d 781, ¶1.

¶14 In ***Pero***, the father filed a motion seeking modification of the prior physical placement order. ***Pero***, 293 Wis. 2d 781, ¶5. The court modified the prior physical placement order, but also changed its prior order as to legal custody despite the absence of a motion by either party to modify legal custody. ***Id.***, ¶¶13, 19. We concluded that, under the applicable Wisconsin statutes, the court

erroneously exercised its discretion when it modified the legal custody order sua sponte. ***Id.***, ¶31.

¶15 In ***Stumpner***, we applied the same logic and holding from ***Pero*** to similar facts, and concluded that the circuit court also lacked the authority to modify a physical placement order on its own motion. ***Stumpner***, 324 Wis. 2d 820, ¶5.

¶16 It is clear that under the language of WIS. STAT. § 767.451, as interpreted by ***Stumpner*** and ***Pero***, a court cannot order a change to the legal custody or physical placement of a child sua sponte. However, the circuit court did not impermissibly act sua sponte here when it ordered the travel restriction at issue. The facts before us are distinguishable from those in ***Stumpner*** and ***Pero***, where the court did act sua sponte. Here, Williams filed a petition to change the legal custody and physical placement of Y.S. Due to this petition, the issue of custody and placement was squarely before the court. Furthermore, it is undisputed that the travel restriction constitutes an issue of placement. Accordingly, the court did not act sua sponte when it ordered the travel restriction.

¶17 In addition, we do not agree with Schworck's argument that he failed to receive notice that his travel might be restricted and as a result he was denied a meaningful opportunity to refute the need for the travel restriction. The record indicates that Schworck's travel with Y.S. was an area of disagreement between the parties. In fact, both parties presented testimony to the court about Schworck's prior travel with Y.S. For example, Williams testified that Schworck traveled with Y.S. to Rhode Island without her knowledge. She also testified that Schworck had not complied with a court-ordered thirty-day notice requirement and other requirements before taking Y.S. to Africa. Schworck testified that he

had complied with court orders before traveling with Y.S. to Africa. Furthermore, his attorney told the court that he was not opposed to having a third party hold Y.S.'s passport, but stated, "I do think it's problematic to have an order that denies out-of-country travel." The above facts show that Schworck had notice that a travel restriction would be an issue.

¶18 In addition, Schworck had notice when the GAL made the travel recommendation during her closing argument. Furthermore, before issuing its decision, the court considered additional correspondence from Schworck, Williams, and the GAL on issues pertinent to the evidence introduced at trial. Thus, along with notice, Schworck also had an opportunity to raise any objection to the GAL's recommendation to impose a travel restriction. Moreover, although Schworck filed a motion for relief from judgment in which he asked for a hearing in regard to the travel restriction, his affidavit makes no mention of what evidence he would present to the court to refute the need for the travel restriction.

2. The Circuit Court did not Erroneously Exercise its Discretion in Ordering the Travel Restriction.

¶19 Schworck argues that the circuit court's travel restriction is not supported by the record. He asserts that no evidence suggests a risk that he would abduct Y.S., necessitating the stringent restriction.[2] We disagree.

¶20 The decision to modify legal custody and primary placement is within the circuit court's discretion. ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d

[2] To the extent that Schworck frames this issue as a challenge to the sufficiency of the evidence, he does not cite to any particular standard against which to measure the sufficiency of the evidence. Therefore, we take his argument as a challenge to the circuit court's use of discretion in ordering the travel restriction.

745, 764, 498 N.W.2d 235 (1993). Therefore, we will not reverse the circuit court's decision unless it has erroneously exercised its discretion. *See* ***id***. Additionally, we look to the entire record in an effort to support a court's exercise of discretion. *See* ***Hawes v. Germantown Mut. Ins. Co.***, 103 Wis. 2d 524, 543, 309 N.W.2d 356 (Ct. App. 1981).

¶21 We first acknowledge that although the circuit court made detailed findings and conclusions regarding the modification of physical placement and legal custody, the court did not make any specific findings regarding the travel restriction. However, the court's decision and orders indicates that it had several concerns with Schworck that reasonably relate to the travel restriction. The court found that Schworck lacked stability and community ties. Specifically, it found that Schworck was unemployed, had sold his home, and that he did not have a clear plan for housing upon his release from incarceration. The court also found that Schworck failed to recognize and respect the importance of Williams in Y.S.'s life.

¶22 After reviewing the record, we conclude that the circuit court reasonably imposed the travel restriction based on evidence of Schworck's instability, his connections to Kenya, and his prior interference with Williams's placement rights, as we now explain in more detail.

¶23 As to Schworck's lack of stability, Schworck testified to the following: he sold his home and many of his personal belongings because he was "broke," he was temporarily living with his mother, and he had not yet determined where he would be permanently living. In addition, Schworck testified that he was not currently employed and there is no evidence in the record that Schworck had any reasonable and stable job prospects in the Madison area.

¶24 The GAL also expressed concern with Schworck's instability during her closing argument and her recommendation of the travel restriction was directly tied to her concerns with Schworck's instability. The GAL stated, "I think if he wants to travel with Y[.S.] to a nonsignatory nation he needs to demonstrate to the Court that he has enough stability here and can be relied upon to bring Y[.S.] back." Thus, as we can see, the evidence as to Schworck's instability and the tenuous nature of Schworck's ties with the Madison community, reasonably supports the court's stated concern that Schworck may leave the Madison area.

¶25 The circuit court's stated concern that Schworck may leave this country and move to Kenya was reasonably based on Schworck's testimony that he had married a woman who lives in Kenya and that he had met his wife's family who also live in Kenya. The record also shows that Schworck traveled to Africa with Y.S. on two occasions, ostensibly for religious education purposes. Although Schworck testified that he hoped his wife would come to live with him soon, the court's concern that Schworck may live in Kenya is supported by Schworck's connections to that country as well as evidence of his decreasing ties with the Madison community.

¶26 Finally, the travel restriction is reasonably based on evidence that Schworck previously interfered with Williams's placement rights when he traveled with Y.S. For example, Williams testified that Schworck had previously taken Y.S. to Rhode Island without her knowledge in contravention of a physical placement order. Williams further testified that Schworck failed to give her the court-ordered thirty-day notice, travel itinerary, or contact information for a trip to Africa. This interference with Williams placement rights and Schworck's consistent criticism of Williams's parental skills during his testimony supports the court's statement that Schworck appeared unable to recognize the importance of a

relationship between Y.S. and Williams. In turn, the court could reasonably infer from the above evidence that Schworck may act in disregard of Williams's physical placement rights by taking Y.S. to Kenya and not returning Y.S. to Williams.

¶27 Based on the above evidence, we conclude that it was a reasonable exercise of discretion to impose the travel restriction on Schworck.

3. The Travel Restriction does not Violate Schworck's Constitutional Rights

¶28 As best we understand it, Schworck's final argument is that a separate hearing on the travel restriction is required because the restriction limits his First Amendment right to raise his child in the Rastafarian faith. He appears to argue that the circuit court knew that the travel restriction limited his ability to provide religious instruction to Y.S.; therefore, he concludes that the court erred when it failed to grant his request for a hearing and when it failed to apply strict scrutiny analysis in crafting the restriction. We are not persuaded.

¶29 The First Amendment and the Wisconsin Constitution both protect the free exercise of religion.[3] U.S. Const. amend. I; Wis. Const. art. I, § 18. However, the United States Supreme Court has held that while the freedom to believe or profess a certain religion is absolute, the freedom to act on those beliefs is not. ***Cantwell v. Connecticut***, 310 U.S. 296, 303-04 (1940).

[3] Schworck does not make a clear argument that greater protections are warranted by the Wisconsin Constitution; therefore, we focus our discussion of his constitutional claim on the First Amendment.

¶30 The Wisconsin Supreme Court has analyzed the First Amendment's Free Exercise Clause in the context of a placement restriction that limited religious instruction of children. *See* ***Lange v. Lange***, 175 Wis. 2d 373, 502 N.W.2d 143 (Ct. App. 1993). The supreme court held that the parent who is granted sole legal custody has the authority to determine the religious instruction of the child or children even if the noncustodial parent objects to the custodial parent's choice of religion. ***Id.*** at 380. Specifically, in ***Lange***, the court upheld a placement restriction that prohibited the father, Robert, from "imposing his fundamentalist religious views" on his children when the children's mother, Elizabeth, had sole legal custody and had decided to raise the children according to her religion. ***Id.*** at 382-83.

¶31 In rejecting Robert's First Amendment challenge, the court explained that the First Amendment does not grant Robert the freedom to act in conformity with his religion in all circumstances. ***Id.*** at 383. It further reasoned that the purpose of the restriction was not to limit his religious freedom, but instead, was fashioned to protect Elizabeth's right to choose the children's religion. ***Id.*** at 384-85.

¶32 Schworck's argument that the circuit court should have granted him a hearing and that it was required to apply strict scrutiny in crafting the travel restriction is premised on his assertion that the travel restriction infringes on his right to provide religious instruction to Y.S. We see no such infringement because the travel restriction does not prohibit Schworck from raising Y.S. in the Rastafarian faith.

¶33 The restriction does, of course, prohibit Schworck from taking Y.S. with him to certain countries, including Kenya and Ethiopia, that are

nonsignatories to the Hague abduction convention. Assuming, without deciding, that travel to Kenya and Ethiopia would be beneficial to raising Y.S. in the Rastafarian faith, we reject the proposition that the circuit court was required to hold a hearing to determine whether the travel restriction infringed on Schworck's First Amendment right to the free exercise of his religion. Both the United States Supreme Court and our supreme court in ***Lange*** have recognized that the First Amendment does not protect an individual's right to act in conformity with his or her religion in all circumstances. As ***Lange*** indicated, the free exercise of religion protected by the First Amendment may need to give way to protect parental rights related to custody and placement in certain circumstances. Like the restriction in ***Lange*** that was necessary to protect the custodial parent's rights, the travel restriction here is reasonably necessary to protect Williams's placement rights and does not prevent Schworck from attempting to raise Y.S. in the Rastafarian faith. As we conclude above, the record bears this out.[4]

¶34 For the reasons stated above, we affirm the circuit court's travel restriction as part of its decision and orders on legal custody and physical placement.

By the Court.—Orders affirmed.

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

[4] We acknowledge that the factual underpinnings of ***Lange*** are different from the facts of this case. In ***Lange***, the mother had sole legal custody of the children and, as such, had the authority to choose the children's religion. Here, Schworck and Williams have joint custody and while Williams has impasse decision-making authority, she has not demonstrated that a conflict exists as to what religious instruction Y.S. should receive. Despite these factual differences, the analysis in ***Lange*** is nonetheless instructive to our conclusion.