COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1508

Cir. Ct. Nos. 2014PA138
2014PA138PJ

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

IN RE THE PATERNITY OF L.C.:

K.S.C.,

PETITIONER-RESPONDENT,

V.

R.C.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County: J. MAC DAVIS and MICHAEL O. BOHREN, Judges. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 NEUBAUER, C.J. The circuit court adjudicated K.S.C. the father of eight-year-old L.C. and gave him exclusive placement of her upon the default of the mother, R.C., who failed to produce L.C. for genetic testing and fled the jurisdiction.[1] R.C. claims this was error because her husband, R.S., whom she married a month before this litigation was commenced, should have been presumed the father pursuant to WIS. STAT. § 891.41(1)(b) (2013-14).[2] R.C. also contends there was insufficient evidence upon which to adjudicate K.S.C. the father because R.C. engaged in sexual intercourse with two men—one supposedly being R.S.—during the conceptive period.[3] We disagree.

¶2 For the first eighteen months of the litigation, R.C. did not allege that R.S. is the biological father of L.C.; to the contrary, she repeatedly indicated that R.S. is not the father. Under the circumstances of this case, the circuit court did not err in declining to apply the statutory presumption that R.S. is the father, and there was sufficient evidence to adjudicate K.S.C. the father. The exclusive placement of L.C. with K.S.C.—clearly a temporary measure until R.C. returned to the jurisdiction with L.C.—was not an erroneous exercise of discretion, since R.C. was unreasonably interfering with the relationship between L.C. and K.S.C. Further, the circuit court did not err in determining that R.C. has not shown that

[1] K.S.C. believes that R.C. may currently be with L.C. in Israel. Counsel for K.S.C. advised the court that the district attorney for the County of Waukesha has filed criminal charges against R.C.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] In total, R.C. appeals from three orders. The Honorable J. Mac Davis presided over the hearings that resulted in the first two orders appealed from but signed only the first order. The Honorable Michael O. Bohren signed the second and third orders appealed from. He presided over the hearing that resulted in the third order.

she was coerced into agreeing to genetic testing of L.C. Finally, R.C. claims it was error to award K.S.C. attorney fees for the entire litigation and going forward based on her misconduct because until she failed to appear she had not engaged in misconduct. Since the circuit court's reasoning for awarding attorney fees to K.S.C. from the inception of the litigation and going forward is not evident, we reverse in part and remand so that the circuit court can explain its reasoning, and we otherwise affirm.

The Commencement of this Action

¶3 On January 15, 2014, K.S.C. commenced this action alleging that he and R.C. engaged in sexual intercourse between September 2005 and October 2005, that L.C. was born to R.C. on July 2, 2006, and that K.S.C. believes he is the father of L.C.[4] K.S.C. sought an order adjudicating him as the father of L.C. R.C. filed a response alleging that it is unlikely that K.S.C. is the father because the actual conceptive period was between September 4, 2005 and November 3, 2005, and she had sexual intercourse with other men during that time period. Further, R.C. claimed, it was not in the best interests of the child to have K.S.C. adjudicated the father. She did not identify R.S. as a potential biological father.

R.C.'s Motion to Dismiss

¶4 In May 2014, R.C. moved to dismiss the action on the basis that it was not in the best interests of L.C. to have K.S.C. adjudicated the father. In a

[4] Four different judges presided over this matter. At one point, R.C. filed paperwork indicating her intention to run against Judge Linda M. Van De Water, leading Judge Van De Water to recuse herself. R.C. is an attorney.

supporting affidavit, R.C. said that following L.C.'s birth, K.S.C. had signed a consent form to terminate his parental rights. Although K.S.C., R.C., and L.C. had all spent time together, it was in the nature of a friendship between K.S.C. and R.C. and not a father-daughter relationship. K.S.C. had never sent L.C. a birthday card, given her a present for a holiday, or financially supported her. R.C. had married, and L.C. had formed a strong father-daughter relationship with R.C.'s husband, R.S. While R.C. had "never discussed the biology of the matter" with L.C., after R.C.'s marriage to R.S., L.C. "informed her teacher and classmates that she was excited to finally have a dad." L.C. believes R.S. is her father and upsetting that notion might have lasting negative effects on her. R.C. alleged that K.S.C. has serious mental health issues, having even threatened suicide if R.C. did not respond to him in a way he considered appropriate. R.C. requested that the court appoint a guardian ad litem (GAL) in order to investigate the matter and to determine whether R.C.'s motion to dismiss should be granted. This motion, based on R.C.'s contention that it was not in the best interests of L.C. to have K.S.C. adjudicated the father, needed to be decided before any genetic testing was ordered.

¶5 K.S.C. opposed R.C.'s motion, asserting that he had maintained a relationship with L.C., even living with R.C. and L.C. for periods of time, until December 2013 when R.C. denied K.S.C. contact with L.C. K.S.C. requested costs and fees because R.C.'s motion was frivolous.

¶6 The court appointed a GAL. The GAL conducted an investigation which led her to believe that K.S.C. "did have a father-like relationship with" L.C., and that it would be in her best interests to have genetic testing performed. The GAL did not believe that R.C. could carry the burden on her motion. The GAL noted that R.S. wanted to adopt L.C., but that was premature. Both R.C. and

K.S.C. acknowledged that they had sexual intercourse during the conceptive period. As a result, the court denied R.C.'s motion to dismiss and ordered genetic testing.

¶7 On June 30, 2014, R.C. moved for reconsideration and a stay of genetic testing while she pursued leave to appeal. As part of her papers, R.C. submitted an affidavit stating that K.S.C. had never supported the child. R.S., even before they were engaged, happily shared in the parenting duties. R.S. "is the only person L.C. has ever seen as a father figure." Both K.S.C. and R.C. have "never informed L.C. that K.S.C. might be her father … because we both expected and agreed that when L.C. became eligible for step-parent adoption, K.S.C. would terminate his parental rights as L.C.'s putative father."

¶8 On August 7, 2014, the circuit court reopened R.C.'s motion to dismiss and ordered an evidentiary hearing on whether genetic testing is in the best interests of L.C. while staying its prior order.[5]

¶9 On August 29, 2014, the date of the evidentiary hearing on L.C.'s best interests, the court heard extensive argument on a motion K.S.C. filed for summary judgment and R.C.'s motion to dismiss. The court denied K.S.C.'s motion and refrained from deciding R.C.'s motion until there was a hearing in September. During the hearing, counsel for R.C. represented that she believed that L.C. "understands that [R.S.] may not be the biological father, but she is holding [R.S.] out to be her father." In addition, the GAL noted that R.C. had not named

[5] In the meantime, R.C. had petitioned us for leave to appeal and a stay of genetic testing pending a disposition of her leave application, which we granted. However, once the circuit court reopened R.C.'s motion to dismiss, she withdrew her leave application.

the other two men that could potentially be the father and, the GAL thought, R.C. did not even know their names. However, the GAL said, R.S. "is clearly not the father, it was not possible." R.C., who was present at the hearing, did not object to these representations.

¶10 At the next hearing, on September 11, 2014, which R.C. also attended in person, R.C. agreed to withdraw her motion to dismiss and consent to genetic testing. R.C. acknowledged that her decision was made freely and voluntarily after having had sufficient time to speak with her attorney. R.C. was ordered to make herself and L.C. available for genetic testing on September 16, 2014.

R.C.'s Failure to Appear and Present L.C. for Genetic Testing

¶11 By November 6, 2014, R.C. had missed three appointments for DNA testing of L.C. At a hearing, her attorney, hired just two weeks earlier, informed the court that R.C. knew about the hearing and counsel had told her she was required to appear in court. Counsel did not know where R.C. was living, and she would not tell him. The circuit court issued a warrant for R.C.'s arrest.

¶12 At a scheduled hearing on November 17, 2014, R.C. again failed to appear. K.S.C. was still attempting to locate R.C. in order to serve her with an order to show cause why she should not be held in contempt.

¶13 By January 29, 2015, R.C., now represented by her third attorney, still had not appeared. Her recently retained attorney did not know the whereabouts of either R.C. or L.C., and could not confirm if they were even in the United States. However, counsel represented that R.C. had committed to him that she and L.C. would return to Wisconsin within two weeks. R.C refused to give

counsel her address or even indicate if she was in the United States. Counsel had told R.C. that she needed to appear in court. The court ordered that R.C. submit L.C. to genetic testing by February 10, 2015. R.C., however, did not appear.

¶14 At a scheduled hearing on March 2, 2015, R.C. again did not appear. Her attorney had advised her to appear in court. R.C. had expressed to counsel that the order directing genetic testing was "illegal," and that counsel should have it undone. R.C. was "upset" about that order, and she was not going to cooperate with the court. The court noted that it previously lifted the warrant for R.C.'s arrest based on her attorney's representation that she would appear in court.

¶15 Following that hearing, the court issued an order finding that R.C.'s actions in "hiring a lawyer by remote control, making representations to her counsel and to the Court that she intend[ed] to follow court orders and then failing to follow through … [was] manipulative." Her conduct was "interfering with the administration of justice, resisting a determination of who the father of the child is, and such actions are not in the best interests of the child." A warrant was reissued for R.C.'s arrest.

K.S.C.'s Motion for a Default Judgment of Paternity

¶16 On June 2, 2015, K.S.C. moved for a default judgment adjudicating him the father of L.C. based on R.C.'s failure to appear with L.C. for genetic testing. In addition, K.S.C. sought an award of costs and attorney fees, citing WIS. STAT. § 805.03, which permits an award of attorney fees as authorized in WIS. STAT. § 804.12(2)(a) for failure to comply with a court order.

¶17 In opposition, R.C. claimed in an affidavit for the first time—eighteen months after the litigation commenced—that she and R.S. had sexual

intercourse during the conceptive period. In addition, she had sexual intercourse with another man, neither her husband nor K.S.C., during the conceptive period. R.C. claimed that in June 2014 she provided the GAL with the identities of K.S.C. and her husband, and described the third man. The GAL never told her that under WIS. STAT. § 891.41(1)(b) her husband would be presumed the father, and her attorney was unaware of that law. R.C. mentioned that R.S. is listed as L.C.'s father on her birth certificate.

¶18 In light of R.C.'s affidavit, counsel argued R.S. should be presumed to be the father of L.C. pursuant to WIS. STAT. § 891.41(1)(b). R.C. and R.S. engaged in sexual intercourse during the conceptive period, they later married, R.S. assumed the role of L.C.'s father, and no other man has been adjudicated the father. Thus, R.S. met the requirements of § 891.41(1)(b).

¶19 Further, counsel argued, it was not in the best interests of L.C. to have K.S.C. adjudicated the father because he has not developed a substantial relationship with her.

¶20 Finally, there was insufficient evidence upon which to grant K.S.C. a default judgment. The mere fact that K.S.C. and R.C. had sexual intercourse during the conceptive period was not enough given that two other men had sexual intercourse with R.C. as well.

¶21 In reply, K.S.C.'s counsel pointed out that this was the first time R.C. was claiming that R.S. is L.C's father. Counsel recounted that as part of R.C.'s motion for reconsideration and a stay of genetic testing while she pursued leave to appeal, she submitted an affidavit stating that she intended to pursue a termination of parental rights proceeding against K.S.C. so that R.S. could proceed with a stepparent adoption. In that affidavit, R.C. said R.S. is like a father to L.C.,

but not that he is the father. In another affidavit, submitted in support of her motion to dismiss, R.C. mentioned that she "never discussed the biology of the matter" when, following the marriage of R.C. and R.S., L.C. said she was excited to have a father finally. R.C.'s attorney had represented during the hearing on August 29, 2014, that R.S. is not the father of L.C. If R.S. and R.C. did have sexual intercourse during the conceptive period, then R.C. should have pleaded as much. In short, R.C.'s claim that R.S. is the father of L.C. is inconsistent with what she previously claimed.

¶22 Further, counsel had uncovered that four days after stipulating to genetic testing, R.C. and R.S. had signed an acknowledgment of marital child form under penalty of perjury that they are the biological parents of L.C. In short, R.C. and R.S had engaged in "fraudulent actions."

¶23 Counsel argued that whether K.S.C. has a substantial relationship with L.C. is irrelevant. R.C. was trying to relitigate her motion to dismiss, but she voluntarily withdrew that motion and consented to genetic testing.

The Hearing on K.S.C.'s Motion for a Default Judgment

¶24 At the hearing on K.S.C.'s motion for a default judgment, R.C. again did not appear. Her attorney informed the court that he had advised R.C. that she was obligated to follow the court's orders. No adjournment of the hearing was requested, and R.C. did not offer an explanation for her nonappearance.

¶25 The court discussed with the parties whether it was appropriate to adjudicate K.S.C. the father by default, taking into account that while R.C. was denying K.S.C. his day in court, there were other men who could be the father, including an unnamed male and now R.S. The GAL responded that she found

R.C.'s "affidavit very interesting." She went back to her notes to check what R.C. had said when they first met. R.C. said that she had sexual intercourse with two other men during the conceptive period but she would not name them. When R.C. came to the GAL's office she brought her husband, and R.C. "did emphatically state … that her husband [R.S.] was not one of those three individuals." R.C. said she first met her husband at a Halloween party in October 2005 after she found out she was pregnant. R.C. and her husband began spending time together in the fall of 2012. They had their first official date in April 2013. In October 2013, they became engaged and then married in December of that year. Thus, the GAL said, "clearly from her discussions with me, her husband was not possibly the father of this child."

¶26 In addition, the GAL had met with R.S., and he "never asserted prior to this affidavit that [he] could possibly be the biological father." Rather, up until now, R.C. had asserted in papers to the court that her husband "acted as the father," that she "finally had a … 'father figure' … in her life." The GAL thought it was "a rather drastic measure to default [R.S.] at this juncture," but the GAL saw "no other choice based on her own conduct" in thwarting multiple court orders, avoiding genetic testing at all costs, taking L.C. out of school, and disappearing without telling anyone where she was going. The only reason R.C. could be avoiding court, the GAL said, was because she truly believed K.S.C. is the biological father of L.C. Thus, the GAL's recommendation was to grant K.S.C.'s motion for a default judgment.

¶27 The court granted K.S.C.'s motion for default judgment. It reasoned that R.C. had been "manipulative, trying to get her way regardless of whether that complies with the law or fairness," making inconsistent statements to the court and in her statements and filings, and even refusing to submit to the court's

jurisdiction. The court had a "hard time concluding that she is doing anything other than lying with respect to some of the things she is claiming." The acknowledgement of R.C.'s husband "late in the game … coming around through the back door seemed pretty dubious" to the court. However, while adjudging K.S.C. to be the father, the court would schedule a motion to reopen.

¶28 In addition, the court granted exclusive placement of L.C. with K.S.C. "pending [R.C.] submitting herself to the Court's jurisdiction in person." If R.C. submitted herself to the jurisdiction of the court, then "there could be a substantially different outcome than today." The genetic testing might show that K.S.C. is not the father and, even if it shows he is the father, there is "still the potential to ask to reopen and try to prove that he shouldn't be adjudicated" the father. In short, "placement may be reviewed in the future if [R.C.] submits herself to the jurisdiction of the … Court."

¶29 At the request of K.S.C.'s counsel, the court also said it would grant him attorney fees and costs "to date" in light of R.C.'s misconduct. K.S.C.'s counsel was directed to submit an affidavit so that R.C.'s counsel would have the opportunity to object. If R.C. objected, then a hearing would be held. Otherwise, the court would review the submissions and approve it.

¶30 The court entered a written order consistent with its ruling from the bench. R.C. appeals from this order.

R.C.'s Motions to Reopen the Default and Dismiss the Action

¶31 On July 17, 2015, R.C. moved to reopen the order entered upon her default and the order requiring genetic testing. In a supporting forty-one paragraph affidavit, R.C. recounted the factual background of the litigation. As

relevant, she stated that when she first met the GAL on June 4, 2014, she told her that during the conceptive period she had a sexual relationship with both K.S.C. and R.S. and a third man, but the GAL did not ask for any information about the unnamed man. With R.C. at the meeting was R.S., and he confirmed that he and R.C. had a sexual relationship beginning in October 2005. Towards the end of the meeting, the GAL reviewed her notes aloud, and it was clear that she had misunderstood what R.C. had told her. R.C. and R.S. clarified when they met, when R.C. learned she was pregnant, and how long R.C. and R.S. had been in a relationship. The GAL did not amend her notes, but R.C. assumed that she would do so. A week later, R.C.'s counsel recounted for R.C. what the GAL had said about her meeting with R.C., that R.C. did not meet R.S. until August 2013, and that R.C. had admitted to living with K.S.C. for years. R.C. denied making any such statements. Later, the GAL misrepresented to the court the contents of her meeting with R.C.

¶32 After an evidentiary hearing was granted on R.C.'s motion to dismiss, she continued, the GAL spoke with a friend of hers who was also a friend of R.C.'s mother. The friend recounted the conversation to R.C., telling her that if she did not withdraw her motion to dismiss, the judge would rule against her, that K.S.C. would receive overnight placement, and R.C. would lose custody of L.C. On the date of the evidentiary hearing, on September 11, 2014, the judge met with counsel, including the GAL, in chambers, after which R.C.'s counsel told R.C. that the judge was inclined to grant overnight placement with K.S.C., and that if R.C. continued with the hearing, she would likely lose L.C. As a result of this, and other circumstances, including her mistaken understanding of the presumption statute, R.C. decided to stipulate to withdraw her motion to dismiss. The stipulation was made under duress. When she agreed to withdraw her motion in

court, she was "crying so hard" that she did not hear the judge when asked if she wanted to withdraw her motion. R.C.'s attorney had to elbow her and tell her she had to agree. R.C. said, "what," and then, "yes."

¶33 It remained R.C.'s position that it was not in the best interests of L.C. to have K.S.C. adjudicated as the father. She asked that the order directing genetic testing be reopened and the court consider whether ordering genetic testing is in L.C.'s best interests, while presuming that R.S. is her father.

¶34 R.C. said that because of a miscarriage she could not travel to Wisconsin for a hearing on her motions to reopen the default and to dismiss. She did not seek an adjournment of the motion date that the circuit court scheduled when it granted the default judgment.

¶35 R.C. also moved to dismiss the action on the basis that none of L.C.'s parents lived in Wisconsin and, thus, the court no longer had jurisdiction. In support, R.C. submitted an affidavit from R.S. who stated that he believes he is the biological father of L.C. He and R.C. had sexual intercourse during the conceptive period. R.S. went on to recount many of the same allegations as R.C.

The Hearing on R.C.'s Motions

¶36 R.C. did not attend the hearing on her motions to reopen the default judgment and to dismiss. The court denied her motions. The court found R.C.'s behavior on the verge of "ridiculous." More importantly, she had willfully defied legal process and, in doing so, hurt L.C., who should have her father identified. If it turned out, after genetic testing, that K.S.C. is the biological father, then "almost undoubtedly the Court would reopen the proceedings with respect to terms."

¶37 R.C.'s counsel asked for clarification on the issue of attorney fees, inquiring if R.C. was to pay attorney fees from the inception of the case or from her noncooperation with genetic testing. After reviewing its prior order, the court said that the award was "from the beginning."

¶38 The court signed an order denying R.C.'s motions. R.C. also appeals from this order.

R.C.'s Motion to Reconsider the Award for Attorney Fees

¶39 R.C. moved for reconsideration of the award of attorney fees, arguing that it was an erroneous exercise of discretion to force her to pay for all of K.S.C.'s attorney fees from the case's inception. The basis for the award was R.C.'s misconduct, but there was no misconduct until R.C. failed to appear for genetic testing. Thus, up until that point, K.S.C. should be responsible for his own attorney fees.

¶40 The prior judge having retired, a new judge considered R.C.'s motion to reconsider. The court read the transcript from the prior hearing and noted the judge's conclusion that R.C. had been "manipulative, trying to get her way regardless whether that complies with the law or fairness." The prior court noted that there may be fraud, and found that it could not conclude that R.C. was doing "anything other than lying with respect to some of the things she's claiming," noting R.C.'s "late in the game" claim that R.S. is the father. After reviewing the record, the court agreed with the prior judge's conclusion that R.C. "may have taken less than a credible position from the initial opposition to the paternity [petition] and the initial steps apparently to have someone other than the biological father determined to be the father." The court found that R.C. "built

upon that less than credible position each time she failed to participate or she obstructed the process."

¶41 The court denied the motion to reconsider, finding that there was no new evidence. The court ordered R.C.'s obligation to pay K.S.C.'s attorney fees to continue until further order of the court. The court ordered a hearing on the amount of the attorney fees owed to K.S.C, although R.C.'s attorney indicated that the hourly rate was not being challenged, the parties were attempting to resolve specific challenged provisions, and that they would report back to the court. The record does not contain any additional information, although R.C. does not challenge the allowance rate or particular entries on appeal.

ANALYSIS

¶42 R.C. contends that the circuit court erred in granting K.S.C. a default judgment because he did not rebut the statutory presumption that R.S. is the father of L.C., and there was insufficient evidence to adjudicate K.S.C. as the father of L.C. because R.C. alleged she had sexual intercourse with two other men during the conceptive period.[6]

Default Judgment

Applicable Law and Standard of Review

¶43 WISCONSIN STAT. § 767.893(1m) provides that

[6] The GAL filed a letter with this court on February 9, 2016, declining to file a brief because she is in "broad agreement" with K.S.C.'s brief except on the issue of the award of attorney fees on which she takes no position.

> a court may enter an order adjudicating the alleged father, or male alleging that he is the father, to be the father of the child under [WIS. STAT. §] 767.89 if the mother of the child fails to appear at the … scheduled genetic test … if sufficient evidence exists to establish the male as the father of the child.

¶44 K.S.C., as the party bringing the action for a determination of paternity, bears the burden of proof by a "clear and satisfactory preponderance of the evidence." WIS. STAT. § 767.87(8).

¶45 The use of the word "may" in WIS. STAT. § 767.893(1m) demonstrates that the entry of an order adjudicating an alleged father as the father upon the mother's default is discretionary. *See* ***Shirk v. Bowling***, 2001 WI 36, ¶15, 242 Wis. 2d 153, 624 N.W.2d 375; *cf.* ***Kathryn B. v. Sheldon S.***, 173 Wis. 2d 864, 868, 496 N.W.2d 711 (Ct. App. 1993). A decision to grant a default judgment will be reversed only if the circuit court erroneously exercised its discretion. ***Backus Elec., Inc. v. Petro Chem. Sys., Inc.***, 2013 WI App 35, ¶16, 346 Wis. 2d 668, 829 N.W.2d 516. A circuit court appropriately exercises its discretion when its determination is "made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law" so as to reach "a reasoned and reasonable determination." ***Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc.***, 2002 WI 66, ¶65, 253 Wis. 2d 238, 646 N.W.2d 19. While default judgments are viewed with disfavor, "[e]ven if the evidence favoring a default judgment is slight … an appellate court should affirm unless it was impossible for the trial court to grant the judgment in the exercise of its discretion." ***Martin v. Griffin***, 117 Wis. 2d 438, 442, 344 N.W.2d 206 (Ct. App. 1984).

The Statutory Presumption

¶46 WISCONSIN STAT. § 891.41(1)(b) provides that

> [a] man is presumed to be the natural father of a child if … [h]e and the child's natural mother were married to each other after the child was born but he and the child's natural mother had a relationship with one another during the period of time within which the child was conceived and no other man has been adjudicated to be the father or presumed to be the father of the child under par. (a).

The presumption "is rebuttable, not conclusive." ***J.F. v. R.B. and T.B.***, 154 Wis. 2d 637, 640, 454 N.W.2d 561 (Ct. App. 1990).

¶47 In granting the default judgment, the circuit court properly rejected R.C.'s reliance on the presumption of WIS. STAT. § 891.41(1)(b). The court found R.C.'s belated reliance on § 891.41(1)(b) to be incredible, and there is no basis to disturb that credibility determination.

¶48 R.C. did not allege that R.S. is the father of L.C. until eighteen months after this paternity action was commenced. Up until that time R.C. had given every indication that she believed K.S.C. is the father of L.C. She sought to block genetic testing as not in the best interests of L.C., and not because she thought someone other than K.S.C. is the father. She referred to R.S. "as a father figure," not *the* father. R.S. wanted to accomplish a "*step*-parent adoption," once K.S.C.'s rights as putative father were terminated, which, of course, would be completely unnecessary if R.S. is the father. (Emphasis added.) R.C. told the court that when she and R.S. married, L.C. "informed her teacher and classmates that she was excited to finally have a dad." R.C. and R.S. did not correct L.C. by discussing "the *biology* of the matter" with L.C. (Emphasis added.)

¶49 Besides R.C.'s own affirmative statements, she did not correct the record when the GAL said R.S. "is clearly not the father, it was not possible," or even when her own attorney said she believed that L.C. "understands that [R.S.] may not be the biological father, but she is holding [R.S.] out to be her father."

¶50 In short, R.C. had acknowledged on multiple occasions that R.S. is not the biological father of L.C. Thus, the circuit court did not err in determining that R.C. failed to meet her burden to show that the statutory presumption of WIS. STAT. § 891.41(1)(b) should apply. ***Berner Cheese Corp. v. Krug***, 2008 WI 95, ¶54, 312 Wis. 2d 251, 752 N.W.2d 800 ("party seeking the benefit of a presumption carries the burden of establishing that presumption").[7]

Sufficiency of the Evidence

¶51 As to R.C.'s sufficiency of the evidence challenge, it is undisputed that K.S.C. and R.C. had sexual intercourse during the conceptive period. This is sufficient evidence to establish that K.S.C. is the father of L.C. While R.C. claims that the evidence is insufficient because she alleged that she had sexual intercourse with two other men during the conceptive period, K.S.C. has no obligation to disprove that claim under the circumstances. K.S.C. does not have access to the identities of the men with whom R.C. allegedly had sexual intercourse, the dates she allegedly had sexual intercourse with them, or even to L.C. from whom

[7] We also note that R.C. did not testify under oath and was not cross-examined because of her continued failure to personally appear. Her refusal to appear and to submit L.C. to genetic testing denied K.S.C. the ability to refute the application of the presumption, much less to rebut the presumption, had it been established. *See* WIS. STAT. § 891.41(2) (stating that the presumptions set forth in the statute can be rebutted by genetic test results of a man other than the man presumed to be the father under subsec. (1)).

genetic material would definitively prove or disprove K.S.C.'s claim of paternity. R.C. alone has this information in her possession, and she has refused to appear. Under these circumstances, to require K.S.C. to prove that these two other unidentified men are not the father would be to impose an insurmountable burden on him. It was R.C.'s burden to rebut the prima facie evidence establishing that K.S.C. is the father, which she failed to do. Sufficient evidence supports the circuit court's entry of a default judgment pursuant to WIS. STAT. § 767.893(1m).

¶52 Accordingly, a default judgment was properly granted adjudicating K.S.C. the father of L.C.[8]

Coercion

¶53 Although R.C. did not cite any statutory provision for vacating the stipulation agreeing to genetic testing, an allegation of coercion is encompassed within the catch-all provision of WIS. STAT. § 806.07(1)(h). Section 806.07 gives the circuit court broad discretionary power to relieve a party from a stipulation. *See* ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985). A circuit court's determination denying a motion pursuant to § 806.07 will not be disturbed absent an erroneous exercise of discretion. ***Nelson v. Taff***, 175 Wis. 2d 178, 187, 499 N.W.2d 685 (Ct. App. 1993). "The term 'discretion' contemplates a process of reasoning which depends on facts that are in the record" or can be reasonably inferred therefrom and leads to a logical conclusion based on proper legal standards. ***M.L.B.***, 122 Wis. 2d at 542.

[8] WISCONSIN STAT. § 767.893(3) permits a default judgment to be reopened.

¶54 Primarily, R.C. argues that her stipulation should not have been accepted because everyone involved mistakenly believed that the presumption of WIS. STAT. § 891.41(1)(b) did not apply because they thought "the mother [had] to be married either at the time of conception or at the time of birth." R.C.'s argument distorts the record. As already discussed, the reason that no one thought that § 891.41(1)(b) applied was because for the first eighteen months of the litigation R.C. did not allege any facts that would have led anyone to think R.S. is the father of L.C. Indeed, R.C. represented and agreed with the representations of her attorney and the GAL (by her silence) that she and R.S. did not engage in sexual intercourse during the conceptive period. There was no mistake of law.

¶55 Secondarily, R.C. claims that she was "under extreme duress" when she stipulated to genetic testing, there being threats that R.C. would lose custody of L.C. if R.C. went forward with her motion to dismiss, which the court had already decided to deny. R.C.'s claims of duress are built upon layers of hearsay—from the GAL, to a friend of R.C.'s mother, to R.C or from an off-the-record conversation from the court, to R.C.'s counsel to R.C. There is no affidavit from this friend of the GAL or from R.C.'s former counsel. In any event, R.C.'s belated claims of coercion are belied by the record showing that R.C., who is an attorney herself, had freely and voluntarily consented to genetic testing after having had sufficient time to discuss the matter with her attorney. Thus, the circuit court did not err in declining to relieve R.C. from her stipulation agreeing to genetic testing.

Exclusive Placement

¶56 R.C. contends that the circuit court erred in granting K.S.C. exclusive physical placement of L.C. because it did not consider any of the factors

enumerated in WIS. STAT. § 767.41(5)(am) for determining the best interests of L.C., and the court did not state in writing its findings as to why it would be in the best interests of K.S.C. to have exclusive physical placement of L.C.

¶57 The circuit court's order granting K.S.C. exclusive physical placement of L.C. was not a final order but a temporary one, as evidenced by the circuit court's granting of exclusive physical placement of L.C. to K.S.C. "pending [R.C.] submitting herself to the Court's jurisdiction in person."

¶58 WISCONSIN STAT. § 767.225(1)(am) permits a court to grant "periods of physical placement to a party in a manner consistent with [WIS. STAT. §] 767.41," meaning that "the court shall consider the factors under [WIS. STAT. §] 767.41(5)(am), subject to [WIS. STAT. §] 767.41(5)(bm)." Sec. 767.225(1n). Under the circumstances, where R.C. failed to appear for genetic testing and fled Wisconsin, the circuit court considered the appropriate factors, that is, those factors for which it had information, emphasizing R.C.'s unreasonable interference in L.C.'s relationship with K.S.C. In other words, the circuit court cannot be expected to address factors such as the wishes of L.C., the interaction and relationship between L.C. and R.C. and K.S.C., or the amount of quality time that L.C. had spent with R.C. and K.S.C in the past, on which the court had little information owing to R.C.'s disappearance with L.C. *See* § 767.41(5)(am)2., 3., 4.

¶59 The information that the court did have—that R.C. was "unreasonably interfer[ing]" with L.C.'s continuing relationship with her adjudicated father—was the primary basis for awarding exclusive physical placement of L.C. to K.S.C., which was made evident in the record. *See* WIS. STAT. § 767.41(5)(am)11.

¶60 The determination of placement is committed to the discretion of the circuit court, and its determination will not be disturbed absent an erroneous exercise of its discretion. *See* ***Brandt v. Witzling***, 98 Wis. 2d 613, 618, 297 N.W.2d 833 (1980). The record amply supports the circuit's court factual findings, and it was within the circuit court's discretion to conclude that R.C.'s interference was the overriding statutory factor that warranted granting—at least, temporarily—exclusive placement of L.C. to K.S.C. *See* WIS. STAT. § 767.225(1)(am) ("During the pendency of the action, [the court may] make *just* and *reasonable* temporary orders concerning … granting periods of physical placement." (emphasis added)).

Attorney Fees

¶61 As R.C. correctly points out, both upon awarding K.S.C. all of his attorney fees and costs from the beginning, and upon reconsideration, when the court ordered the payment going forward, the circuit court did not identify the legal basis for so ordering. Without having done so before the circuit court, K.S.C. now attempts to justify the award under the doctrine of overtrial, without addressing the other statutory bases he raised below. We agree with K.S.C. that the circuit court's findings, and particularly its conclusion that R.C. took a less than credible position from the initial opposition, and then built upon that each time she failed to participate and obstructed justice, are not clearly erroneous. However, without an explanation of its reasoning, we cannot review if the circuit court determined that unreasonably excessive litigation had occurred resulting in overtrial from the inception of the case and going forward until further order of the court, or if the court relied on the statutory bases identified by K.S.C. below. *See* ***Zhang v. Yu***, 2001 WI App 267, ¶¶11-25, 248 Wis. 2d 913, 637 N.W.2d 754. Moreover, neither the circuit court nor K.S.C. has identified a legal basis for a

prospective award. As such, we remand the matter to the circuit court to reconsider its award, to make the necessary findings of fact, and to explain its reasoning.

CONCLUSION

¶62 R.C.'s conduct during the course of this litigation has been egregious. Under the circumstances of this case, it was appropriate to adjudicate K.S.C. the father of L.C. upon R.C.'s default and to give him temporary exclusive physical placement of L.C. until R.C. submitted to the court's jurisdiction. R.C.'s claim that she was coerced into agreeing to genetic testing is not supported by sufficient evidence and, in any event, belied by the record. The award of attorney fees to K.S.C. is not sufficiently explained and, thus, must be remanded to the circuit court.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.