COURT OF APPEALS OF WISCONSIN
DISTRICT IV

Case No. 2011AP2660

In re the placement of: A.M.K.

BELVA M. BOWDEN

Petitioner-Appellant-Cross Respondent

v.

AMY S. KORSLIN

Respondent-Respondent-Cross Appellant

REPLY BRIEF OF RESPONDENT-RESPONDENT-CROSS APPELLANT

An appeal from the Circuit Court for Wood County, Hon. Gregory J. Potter, Judge.

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ARGUMENT

I. AMY RAISED THE ISSUE OF SEC. 767.41 VS. SEC 767.43 WIS. STATS. AT THE TRIAL.

Belva argues that Amy did not raise the issue of the Court improperly treating the Court's decision as a family law divorce under sec. 767.41 Wis. Stats rather than a third party visitiation request under sec. 767.43 Wis. Stats. The record shows otherwise.

Specifically, at the hearing of November 18, 2010, Amy addressed the Court concerning the basis upon which he was imposing various obligations upon her in regards to notice to Belva when Amy took her child on vacation. In addressing that issue, Amy directly stated that the court had viewed this case "as a family law technically divorce case in laying out this placement schedule". (R.67;12,13). Amy further questioned the authority of the Court to enter such an Order and specifically inquired of the Court where the authority for such an Order came from. (R.67;12). Amy then proposed that if the Court was treating this as a divorce type Order, the Court was also mandated to enter an order requiring Belva to pay Child Support to Amy, to which the Court agreed.(R.67;13).

In addition, by Motion dated December 5, 2010, Amy specifically challenged the authority of the Court to extend third party placement rights to include summer placement, holiday placement, travel, and other parental rights. (R;73;1). At the Reconsideration hearing held on April 5, 2011, once again, Amy objected to the entry of the Order on the basis that it "extended third party visitation rights in the manner such as one would get in a divorce action", (R.76;14), and argued that the Court had "…crossed the line to usurping not only the authority of my client as a mother but also it really gets to the point of going beyond routine daily decisions during her visitation to the point of (Belva) making major decisions that have long term effects for the child…." (R.76;20). Amy continued to make this argument throughout the hearing on Reconsideration repeatedly arguing that the Court had no authority or supporting case to law to expand Belva's visitation rights to the equivalent of a divorce judgment.

Under sec. 767.41(4)(a)2. Wis. Stats., the Wisconsin Legislature specifically mandated that:

> *"…The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for for different households".*

In contrast, sec. 767.43 Wis. Stats. states,

> *"…upon petition by a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child."*

Had the Legislature intended that non-parents petitioning the Court were to be awarded the same level of placement as a natural parent, it would have provided language at least similar to that in sec. 767.41(4) Wis. Stats. The Legislature clearly elected not to do that and instead created a different, lesser level of placement determined to be "reasonable" as opposed to a "maximizing" of the placement time with each party. For the Court to acknowledge that the Order in this case was intended to mirror a divorce judgment involving the natural parents of a child is a complete departure from the intent of sec. 767.43 Wis. Stats. and places a non-parent in the same position as a natural parent for all purposes in regards to a division of placement time with a minor child. There is no law that authorizes such an extension of the statute and no Wisconsin case that supports such an extension. The fact that that third party rights are delineated in a separate statute completely outside of the mandates and criteria of a family law divorce order, and specifically classifies third party rights to be "visitation" as opposed to

"placement" makes it evident that the Legislature did not intend to place a non-parent in the same legal position as natural parents. In *Rick v. Opichka*, 2010 WI App 23, 323 Wis. 2d 510, 780 N.W. 2d 159, the Court made a clear distinction between "placement" and "visitation". The court stated:

> *"We believe that when children visit their grandparents and stay with them as a guest, the grandparents have the responsibility to make routine daily decisions regarding the child's care but may not make decisions inconsistent with the major decisions made by a person having legal custody". Id at ¶13.*

The Court went on to state:

> *"…the presumption is that the spouse without primary placement shall have periods of physical placement. On the other hand, as we have already discussed, the grandparents are afforded no such presumption. In fact, the presumption is the opposite --grandparents get what the natural parent gives them unless they can show that the children's best interests is for the court to order otherwise." Id at ¶14.*

There is no case law or other legal support for the Court to enter an Order that provides a non-parent with the same "placement" rights as would be awarded to a natural parent. The Court cited no authority other than what he believed to be the "best interests of the child". (R.67;12).

II. THE COURT DID NOT ACCURATELY CONSIDER AMY'S OFFER OF PLACEMENT AND USED AN INCORRECT STARTING POINT.

Belva claims that Amy's offer of placement was "no legally enforceable placement at all" (Brief, p.19). Based upon the record in this case, that is clearly not the offer made by Amy. In fact, Amy specifically offered placement consisting of the same amount of time that Belva currently had consisting of four (4) overnights per month but not on a set every other weekend schedule. In addition, Amy agreed that one week of summer placement would also be appropriate. Finally, Amy also proposed that, if Belva were to become more cooperative, she would not object to additional summer and holiday placement. (R.56;49-50).

In the decision entered by the Court on October 27, 2010, the court misstated the offer of Amy and said:

> *"Amy's position in regards to the starting point was that she proposed Belva have essentially the same amount of time she has now with the child. That being four overnights per month, but it not be set on a rigid every other weekend schedule.*
>
> *In the event that Belva were to begin to cooperate in a better manner, Amy would also be willing to permit additional placement for the summer and holidays."*
> *(R.63;4.)*

Up to this point the Court was relatively accurate in his statement except that he failed to include her additional offer of summer placement that was not conditioned on any

changes. However, after stating those facts, the Court then proceeded to state:

> *"In reviewing Amy's comments, she does not want a schedule and the amount of time Belva gets to spend with (A.K.), will be left to her discretion.*
> *That is the starting point at this point in time."(R63;4).*

The Court completely ignored Amy's willingness and testimony to agree to four (4) overnights as an Order, but also left out the agreed to summer placement she offered as a part of that Order. At no time did Amy state that she wanted the discretion to decide what placement time Belva has but only maintained that she did not want a rigid schedule that would interfere with her time with her child.

III. THE COURT FAILED TO CONSIDER DR. NELSON'S TESTIMONY AS TO AMY'S OFFER OF PLACEMENT

In Belva's brief at p. 39 there is a reference to the testimony of Dr. Nelson and his belief that giving Amy unilateral decision making authority would create "unacceptable risk" and that the child would experience "additional grief, compromised functioning in later life and perhaps resentment toward Amy". In fact, what Dr. Nelson said was that these things could occur if there was a "total disruption of contact with Belva" and made no statement concerning giving Amy decision –making authority. (R.49;32). Not only did Dr.Nelson further state that any

such risks can be limited through maintaining healthy relationships", (R.49;32) but he further acknowledged that the reduction in time that Amy decided to enforce does not necessarily have a negative impact on the child. (R.49;38). In fact, Dr. Nelson agreed that there are no social, academic or behavioral issues that are adversely affecting the child (R.49;47) and is not aware of any changes in either the child's academic, social or emotional state despite the fact that placement had changed from a full time placement to part-time placement to every other weekend placement over the last several years.(R.49;45-47).Dr. Nelson was very clear that, other than a "possibility" of something occurring in the coming years, he observed no detrimental effects of the current placement arrangement on the child. (R.49;51-53). Finally, Dr. Nelson was not aware of anything Amy has done to terminate the relationship or interfere with the relationship other than limiting visitation time with Belva. (R.49;34,41-42).

In the decision of the Court on October 27, 2010, while the Court recognized the words of Dr. Nelson, he failed to recognize the words that clearly stated no such negative issues were present with the child, failed to recognize that there was no evidence to believe that Amy

intended to terminate placement, and failed to acknowledge that the undisputed testimony of Dr. Nelson was that there were no detrimental effects upon the child due to the decision of Amy to enforce the current placement schedule.(R.63;14-17). The Court also implied that the child is being used as a "pawn" by Amy (R.63;16), and is trying to control the behavior of Belva through the child.(R.63;16). No such testimony exists and, in fact. Dr. Nelson unquestionable stated that despite the anger between the parties they are able to have visitation back and forth and communicate with each other. (R.49;35).

The Court failed to properly consider the testimony of Dr. Nelson which completely undercuts the basic requirement to prove that the decision of Amy is not in the best interests of the child. While the parties may disagree about how to raise a child, that is not the question to be addressed by the Court. There needed to be a finding, based upon the record, that the decisions of Amy are not in the best interests of the child and no such evidence exists. The court did what is precisely prohibited under the law and he substituted his beliefs for the beliefs of Amy as to what is best for her child.

CONCLUSION

For the reasons set forth herein, Amy requests that the Court vacate the Order of the trial court.

Respectfully submitted

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19 (8)(b) and (c) for a brief and appendix with a monospaced font. The length of this brief is 10 pages.

ELECTRONIC FILING CERTIFICATION

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12).

I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification has been served with the paper copies of this brief filed with the Court and served upon all opposing parties.

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