COURT OF APPEALS
DECISION
DATED AND RELEASED

March 18, 1997

NOTICE

No. 96-0195

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

In re the Marriage of:

Anne E. Czarnecki, n/k/a Gerard,

Petitioner-Appellant,

v.

Paul A. Czarnecki,

Respondent-Respondent.

APPEAL from orders of the circuit court for Milwaukee County: ROBERT C. CANNON, Reserve Judge. *Affirmed and cause remanded with directions*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Anne E. Czarnecki (n/k/a Gerard) appeals from two orders entered after she filed a motion seeking transfer of primary placement of her two children and a motion to find her ex-husband in contempt. She claims that the trial court's written order materially differs from

its oral ruling in that: (1) the written order does not direct that placement be transferred to Gerard after she undergoes a satisfactory psychological examination; (2) the written order requires psychologist Dr. Itzhak Matusiak to remain on the case; (3) the written order finds that Paul A. Czarnecki used due diligence in general in attempting to communicate with Gerard; (4) the written order finds that Gerard knew the location of the car dealership where she could have picked up her children; and (5) the written order finds that Gerard is not cooperating with the court's orders. Because we resolve each contention in favor of upholding the orders, we affirm.[1]

I. BACKGROUND

Gerard and Czarnecki were divorced on September 19, 1994. Czarnecki was granted primary placement of the two minor children during the school year and Gerard was granted primary placement during the summer. On November 17, 1994, Gerard filed a motion asking the court to reconsider its judgment of divorce and grant her primary placement. A hearing was held to address this motion on August 25, 1995.

Gerard filed another motion on September 29, 1995, requesting that the trial court find Czarnecki in contempt for failing to provide the children to her on September 26, 1995. The relevant facts pertaining to this motion are as follows. Gerard was to pick up the children for a visit on September 26. Three days earlier, Gerard had sent Czarnecki a note requesting that the transfer of the children take place at a Brookfield mall rather than Czarnecki's home. Czarnecki attempted to phone Gerard to tell her this would not be possible because he had a car repair appointment. He could not reach Gerard, however, because she had changed her phone number.

As a result, Czarnecki did not meet Gerard at the mall. When he did not show up, Gerard drove to his home where she found a note on the door

[1] Gerard also claims that her due process rights were violated. This claim, however, was raised for the first time on appeal. Accordingly, we decline to address it. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

explaining that he and the children were at the Gordie Boucher car dealership getting the car repaired. Gerard returned to her home.

A hearing occurred on October 12, 1995, to address Gerard's motion for contempt relating to this incident. The trial court did not find Czarnecki in contempt.

Czarnecki submitted a proposed order relative to both the August and October hearings. Gerard submitted objections to both orders pursuant to the five-day rule. She submitted her own proposed orders. These concerns were addressed at an October 24, 1995, hearing held to discuss unrelated disputes between the parties. Subsequent to this hearing, Czarnecki submitted revised proposed orders. The trial court signed Czarnecki's orders. Gerard appeals from those orders.

II. DISCUSSION

Gerard argues that the trial court's findings contained within the two orders are clearly erroneous or constitute an erroneous exercise of discretion. We review a trial court's findings of fact under the clearly erroneous standard. *See* § 805.17(2), STATS. Moreover, we will not reverse a discretionary determination if the trial court applied the pertinent facts to the relevant law and used a rational process to come to a reasonable conclusion. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 302 N.W.2d 16, 20 (1981).

A. Written Order's Failure to Transfer Primary Placement to Gerard.

Gerard's first claim is that the written order does not document the trial court's oral ruling that placement will be transferred to Gerard after she undergoes a psychological examination. The transcript reflecting the pertinent portion of the oral ruling states: "If, after evaluation down the road, if the court is satisfied that everything is okay, and that [Gerard] can have primary custody of the children again, the court is going to order that she have their custody returned to her." The trial court's written order directs that the children shall remain in the primary custody of Czarnecki and does not specifically state that

upon completion of a satisfactory psychological exam, placement will revert to Gerard.

Based on the foregoing, we are not convinced that the written order materially differs from the oral ruling. This portion of the trial court's oral ruling clearly implies that Czarnecki should continue to have primary placement of the children. Moreover, to the extent that the oral ruling may be interpreted to order transfer of placement contingent upon a future event occurring, it would be violative of existing law. *See* ***Koeller v. Koeller***, 195 Wis.2d 660, 663-64, 536 N.W.2d 216, 218 (Ct. App. 1995) (trial court may not issue prospective custody orders). ***Schwantes v. Schwantes***, 121 Wis.2d 607, 628, 360 N.W.2d 69, 78 (Ct. App. 1984).

Because the trial court's oral ruling can be read to be consistent with its written order and because to include within the written order a provisional condition would violate existing law, we reject Gerard's claim.

B. Written Order Requiring Dr. Matusiak to Remain on the Case.

Gerard next complains about the written order's directive that Dr. Matusiak remain on the case. Dr. Matusiak was involved with performing evaluations earlier in this matter. Because Gerard failed to object to this specific portion of the order, we apply the waiver rule and decline to address this argument. ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

C. Written Order's Finding that Czarnecki Exercised Due Diligence.

Gerard next objects to the finding in the written order providing that "it is clear that the respondent, PAUL A. CZARNECKI, is using due diligence in attempting to communicate with the petitioner, ANNE E. GERARD." We agree with Gerard that the recorded proceedings do not reflect such a finding. It is conceded, however, that the trial court conducted conferences in its chambers lasting approximately five hours. Undoubtedly, the trial court's finding was based in part on those in-chambers conferences.

Each party had an opportunity to submit proposed orders and each party had the chance to object to the other's proposed findings and conclusions, and argue in favor of his or her own. Given these circumstances, we are unable to conclude that the trial court's finding is clearly erroneous. We recognize that many times each party may interpret a trial court's oral ruling differently. This is precisely why proposed orders are submitted pursuant to the five-day rule, allowing opposing parties to raise objections to the submitted orders. This procedure gives the trial court an opportunity to review the orders submitted together with the objections raised before rendering the order it granted at the hearing.

D. Gerard's Knowledge of Car Dealership.

Gerard also challenges the trial court's finding that she knew the location of the Gordie Boucher dealership that Czarnecki and the children had gone to on September 26, 1995. We acknowledge that the recorded oral ruling by the trial court does not contain this specific finding. There is evidence in the record, however, to support such a finding. Czarnecki testified that he wrote the location of the car dealership on the note that he left for Gerard. Gerard admits seeing the note, but claims that it did not contain the location. This conflict in the testimony was for the trial court to resolve. As the arbiter of credibility, the trial court was free to believe Czarnecki. *See* ***Gehr v. City of Sheboygan***, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977).

Czarnecki's testimony supports the finding that Gerard knew the location of the dealership. Accordingly, it is not clearly erroneous. We reject Gerard's claim that this finding should not be in the written order because it was not a part of the trial court's oral ruling. Because the trial court had the opportunity to weigh the credibility of the witnesses, we can assume that the trial court made the finding in a way that supports its decision. ***State v. Wilks***, 117 Wis.2d 495, 503, 345 N.W.2d 498, 501 (Ct. App. 1984), *aff'd*, 121 Wis.2d 93, 358 N.W.2d 273 (1984), *cert. denied*, 471 U.S. 1067 (1985).

E. Gerard's Failure to Cooperate with Prior Orders.

Gerard also objects to the finding that she was "not cooperating with previous orders of the court." From our review of the record, we conclude that this finding is not clearly erroneous. There is evidence to support such a finding, including Gerard's disregard of the court's order to pay child support and her failure to utilize the communication method ordered by the court.[2]

By the Court.—Orders affirmed and cause remanded with directions.[3]

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

[2] Gerard's brief also looks to argue the same points under the proposition that each allegedly erroneous finding constituted an erroneous exercise of discretion. Because we have concluded that the trial court's findings are not clearly erroneous, it is not necessary for us to address this argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

[3] Czarnecki filed a motion seeking frivolous appellate costs and fees. Because we conclude that Gerard or her attorney either knew or should have known that this appeal was without any reasonable basis in law or equity and cannot be supported by a good faith argument for an extension, modification or reversal of existing law, we grant the motion. *See* § 809.25(3)(c)2, STATS. We remand the matter to the trial court for a determination as to the costs and fees associated with this appeal.