COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 99-0504
99-2476

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

IN RE THE MARRIAGE OF:

ELLEN MARIE FISCHER,

PETITIONER-RESPONDENT,

V.

MICHAEL PETER FISCHER,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Michael Peter Fischer appeals from that portion of the judgment of divorce which determined placement of his child and from the

order clarifying that judgment. The issue on appeal is whether the circuit court properly exercised its discretion when it made the placement determination. Because we conclude that the circuit court properly exercised its discretion, we affirm.

¶2 Michael and Ellen Marie Fischer were divorced by a judgment of the court. During their marriage, the couple had one child, Michael Jr., who was four years old at the time of trial. Ellen had another child, Kyle, by a previous marriage. The couple initially stipulated to joint custody of Michael Jr. The circuit court, however, rejected this agreement because of evidence which showed that Michael and Ellen did not trust each other and were not able to communicate with each other. The court concluded that joint custody would not be in Michael Jr.'s best interests and awarded custody to Ellen. During the course of the proceedings, Michael asked the court to order a psychological test of Michael Jr. and Kyle by Michael's expert. The court refused.

¶3 Physical placement determinations are committed to the sound discretion of the trial court. *See* ***Bohms v. Bohms***, 144 Wis. 2d 490, 496, 424 N.W.2d 408, 410 (1988). The exercise of discretion requires that the trial court consider the facts of record in light of the applicable law to reach a reasoned and reasonable decision. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). We will not upset the trial court's exercise of discretion unless it clearly misused that discretion. *See* ***Bohms***, 144 Wis. 2d at 496.

¶4 The first issue Michael raises on appeal is that the court erred when it refused to order the psychological testing of Michael Jr. and Kyle. Michael argues that custody disputes put the best interests of the child at issue. As a result, he continues, anything that helps shed light on this issue should be discoverable.

Under WIS. STAT. § 804.10 (1997-98),[1] the court may order the psychological testing of a party. Kyle is the natural son of Ellen and not Michael. We agree with the circuit court's conclusion that Kyle is not a party to their divorce proceeding. The circuit court, therefore, properly refused to order psychological testing of Kyle.

¶5 Assuming that Michael Jr. is a party to the divorce, we also agree with the circuit court's conclusion that more testing was not necessary. Michael apparently sought additional testing because he was unhappy with the conclusions reached by the other experts. When it denied the motion, the court stated that it had sufficient information from the court-appointed psychologist, the custody evaluator and the other witnesses without requiring the children to go through the additional ordeal of psychological testing. The court concluded that it had sufficient information and did not need the additional information which would have been provided by Michael's expert.

¶6 Michael argues that the fact that the court stated it was a "close call" when it made the placement decision meant that the court needed more information to decide appropriate placement. We disagree. This meant only that it was a difficult decision, not that the court did not have enough information to properly exercise its discretion. The court had sufficient information before it to support its placement determination.

¶7 Michael next argues that the circuit court erred when it granted primary physical placement to Ellen and by failing to order sufficient periods of

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

physical placement with Michael. Michael argues that the judgment fails to set forth with particularity the evidence relied upon in determining that placement should be with Ellen. Further, Michael argues that the court did not consider that Ellen had lied during the proceedings and made its decision based upon one nonstatutory factor.

¶8 We again disagree. The court considered the factors required by statute to be considered, *see* WIS. STAT. § 767.24(5), including para. (k): "Such other factors as the court may in each individual case determine to be relevant." The court gave a thorough and well-reasoned explanation of how the relevant factors applied in this case. The court acknowledged that each party could be a good parent to the child, but concluded that it was in Michael Jr.'s best interests to be with Ellen. This decision was consistent with the recommendations of the experts.

¶9 Michael argues that the court did not factor into its decision its finding that Ellen had lied in some of her evidence. Again, the record does not support this assertion. The court did consider this factor and balanced it against its finding that Michael had clandestinely videotaped Ellen during the same time period. The court also found that Michael had engaged in a kind of "charade" by reading parenting books during the pendency of the divorce proceeding in an attempt, the court concluded, to influence the custody determination. This was, as the court found, a bitterly contested proceeding marked by extreme animosity between the parties. The court considered all of these factors when reaching its determination. We see no reason to disturb the court's decision.

¶10 Michael also argues that the placement schedule fails to effectuate the court's intent. Specifically, he argues that the court erred when it

prospectively reduced the number of weeknights he had Michael Jr. once Michael Jr. started first grade. Citing ***Koeller v. Koeller***, 195 Wis. 2d 660, 536 N.W.2d 216 (Ct. App. 1995), Michael argues that the court erred when it made a prospective placement. In ***Koeller***, the circuit court had granted the motion of the mother, who had primary placement and was suffering from terminal cancer, to award placement to her sister in the event of the mother's incapacity or death. The mother made the motion because of her own illness and because the children's father had a mental illness. *See* ***id.*** at 661. This court reversed, holding that the circuit court lacked the power to "order a change of custody that is to take place at some unknown time in the future, upon the occurrence of some stated contingency." ***Id.*** at 667.

¶11 In this case, the court has not ordered a prospective change in custody, but merely provided for a change in placement based upon an event that will take place at a known time. There is no doubt that Michael Jr. will begin attending first grade at a specific time in the near future (if he has not done so already). Deciding this change in the placement schedule in advance is completely appropriate and saves having these parties come before the court again within a very short period of time.

¶12 Michael next argues that the court erroneously exercised its discretion when it rejected the joint custody stipulation between the parties. Such a stipulation, however, is subject to the approval of the court. *See* WIS. STAT. § 767.10(1); ***Bliwas v. Bliwas***, 47 Wis. 2d 635, 639, 178 N.W.2d 35 (1970) (a court is not bound to accept a stipulation from the parties to a divorce action). In this case, the court rejected the stipulation, finding that it would not be in the child's best interests. Given the lack of trust and inability to communicate

demonstrated by the parties throughout this proceeding, it was not unreasonable for the court to reject the stipulation.

¶13 Michael also contends that the court erred when it failed to compute his support payment under appropriate shared-time payer standards. Ellen responds that Michael is raising this issue for the first time on appeal and hence it is waived. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W. 2d 140 (1980) (no issue or claimed error of the trial court may be reviewed on appeal unless it was raised first before the trial court). We agree that the argument is waived.

¶14 Michael also asserts that the court erred when it amended the judgment for summer placement. The court, however, was merely clarifying what it had attempted to do in its original order. The court, in fact, had given the parties an opportunity to work out the confusion themselves, which, not surprisingly, they were not able to do. The court concluded that its original summer placement order would not work and, therefore, refashioned the order to one which would be more workable. This was an appropriate use of the court's discretion under the circumstances.

¶15 Given the great animosity between the parties, the circuit court in this case had a very difficult task before it when faced with the custody determination. The court thoroughly analyzed the evidence presented, considered the appropriate factors, and reached a well-reasoned and appropriate placement decision. As was stated in a case written nearly thirty years ago: "Unfortunately, too many divorced parents 'allow the desire to nurture their personal animosities to overshadow the welfare of the child'…. The child seems to be more of a football in the game of life than a player." ***Weichman v. Weichman***, 50 Wis. 2d 731, 736, 184 N.W.2d 882 (1971) (citation omitted). The court went on:

> It is difficult enough for a child of a broken home to find [his or her] way through life without having the added burden of being the victim of hatred and hostility between his [or her] parents and relatives. Divorced parents and their kin should remember it is not their wishes or desires which are at stake but the welfare of the child who did not ask to be placed in the tragic circumstances he [or she] finds himself [or herself].

Id.

¶16 For the reasons stated, the judgment and the order of the circuit court are affirmed.

By the Court.—Judgment and order affirmed.

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