COURT OF APPEALS DECISION DATED AND FILED

July 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP1974

Cir. Ct. No. 2003FA339

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE MARRIAGE OF:

CHRISTOPHER H. KARTES,

PETITIONER-RESPONDENT,

V.

JANE M. KARTES,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Jane M. Kartes appeals from a judgment of divorce from Christopher H. Kartes. She challenges that portion of the judgment awarding the parties equal physical placement of their child and requiring her to make a $7500 contribution to Christopher's attorney fees based on overtrial. We affirm the placement decision, reverse the contribution award, and remand to the circuit court for further proceedings on the contribution award.

¶2 The Karteses were married in 1997. Their son was born on May 31, 2000. The action for divorce was commenced March 5, 2003. Christopher is employed as a finish carpenter. Jane runs a horse stable/farm on the property where the parties resided during the marriage. The circuit court adopted the guardian ad litem's placement recommendation and ordered equal periods of placement with the child on a "2-2-3 days" basis. Consequently, placement is with Christopher on Mondays, Tuesdays, and alternating Fridays through the weekends. The judgment provides for the child to be in day care with the current provider on the days and times that Christopher is at work except in case of illness or other emergency.

¶3 Jane's position is that equal placement of the child is wrong because it requires the child to be placed in day care for eight hours a day, three days a week, when placement is with Christopher. She asserts that she rearranged her career and made life choices so she could be an at-home mother. She argues that the circuit court erroneously applied a presumption of equal placement and that the equal placement arrangement fails to "maximize[] the amount of time the child may spend with each parent," as required by WIS. STAT. § 767.24(4)(a)2.

(2003-04),[1] because it fails to recognize that the time the child spends in day care is not time spent with either parent. In short, she does not want her child to spend time in day care when she is available to care for the child.

¶4 The circuit court's placement decision is reviewed under the erroneous exercise of discretion standard. ***Helling v. Lambert***, 2004 WI App 93, ¶7, 272 Wis. 2d 796, 681 N.W.2d 552. The determination must be based upon the facts appearing in the record and the appropriate and applicable law. ***Id.*** Under WIS. STAT. § 767.24(4)(a)2., the circuit 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 different households." Even with this direction, placement of a minor child must be consistent with his or her best interest. *See* ***Arnold v. Arnold***, 2004 WI App 62, ¶12, 270 Wis. 2d 705, 679 N.W.2d 296, *review denied*, 2004 WI 50, 271 Wis. 2d 112, 679 N.W.2d 547 (No. 2003AP1547), *cert. denied*, 125 S. Ct. 112 (2004); ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992); § 767.24(5)(am). The determination of what is in a child's best interest is a mixed question of law and fact. ***Wiederholt***, 169 Wis. 2d at 530-31.

¶5 We first reject Jane's assertion that the circuit court applied an erroneous view of the law by adhering to a nonexistent presumption of equal placement. *See* ***Arnold***, 270 Wis. 2d 705, ¶11 (WIS. STAT. § 767.24(4)(a)2. is not

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

unconstitutional by not providing a presumption of equal placement); ***Keller v. Keller***, 2002 WI App 161, ¶12, 256 Wis. 2d 401, 647 N.W.2d 426 (§ 767.24(4)(a)2. "is not tantamount to a presumption of equal placement"). Jane isolates just one portion of the circuit court's decision in support of her argument. She quotes the circuit court: "the law says, you know, don't cheat one parent versus the other unless you've got a good reason." We do not construe this isolated comment to reflect reliance on a presumption of equal placement or an alteration of the burden of proof like the circuit court in ***Keller*** erroneously imposed. The circuit court's comment came on the heels of rejecting Jane's suggestion that Christopher had problems that mitigated against equal placement. It was merely acknowledging that it was time for changing the parental roles in this case and that there was no reason to deny maximized and equal placement.

¶6 Equally unpersuasive is Jane's suggestion that she is being denied her right to make a career choice to be an at-home mother. Recently our supreme court reiterated that a mother's choice to forego a career to be an at-home mother is not patently unreasonable. *See* ***Chen v. Warner***, 2005 WI 55, ¶¶26, 47, 49, __ Wis. 2d __, 695 N.W.2d 758 (recognizing that the legislature places value on the child care services performed by a custodial parent, recognizing the right of a parent to make such a choice, and refusing to adopt a position favoring or disfavoring a parent's decision to forego outside employment to be an at-home parent). However, Jane's choice to be an at-home mother was never at issue in this case. The circuit court was not making a judgment about it in any respect. Rather, the circuit court's decision to adopt a placement schedule that would place the child in day care was driven by the best interest of the child.

¶7 At the commencement of its placement decision, the circuit court noted its concern for the young child being overexposed to the hostility between

the parties, particularly during transitions between parents. It found no reason to deny Christopher the maximum amount of time with the child as possible. It found Jane to be contentious in nature and thereby making transitions unnecessarily difficult. It commented that even transitions occurring at the police station resulted in fights between the parties being witnessed by the child. It found that the existing situation regarding transitions prevents short periods of placement. Thus, the court concluded that a placement arrangement which would require the child to transition back and forth on a more frequent basis just so Jane could care for the child during Christopher's work hours was not in the child's best interest. Restricting transitions was a goal of the placement arrangement. Implicit was the finding that transitions at the day care, which would occur on two of the three required transitions, would be easier for the child because there would be little interparental contact. Further, there was evidence that placement in day care was good for the child.

¶8 The circuit court also considered the other factors listed in WIS. STAT. § 767.24(5)(am). It found that the child is able to adjust to both parental environments. The court noted the child's need for regularity in the placement arrangement to provide predictability and stability even in the face of the flexibility both parents have to spend time with the child. It relied on the recommendation of the guardian ad litem as supported by an assessment by the family court counseling service. The proper factors were taken into consideration. The placement decision is a proper exercise of discretion.

¶9 We turn to the issue concerning the award of attorney fees based on overtrial. We review both the decision to award attorney fees for overtrial and the determination of the reasonableness of the fees under the erroneous exercise of discretion standard. ***Zhang v. Yu***, 2001 WI App 267, ¶12, 248 Wis. 2d 913, 637

N.W.2d 754. Normally an award of attorney fees requires the circuit court to address the reasonableness of the total fees, the need of one spouse for contribution, and the ability of the other spouse to pay. ***Johnson v. Johnson***, 199 Wis. 2d 367, 377, 545 N.W.2d 239 (Ct. App. 1996). However, findings of need and ability to pay are not necessary in situations where the circuit court determines there is overtrial. ***Id.***

¶10 The doctrine of overtrial developed in family law to compensate the overtrial victim for fees unnecessarily incurred by one party's unreasonable approach to litigation and to deter the unnecessary use of judicial resources. ***Zhang***, 248 Wis. 2d 913, ¶13. "A party's approach to litigation is unreasonable if it results in unnecessary proceedings or unnecessarily protracted proceedings, together with attendant preparation time." ***Id.*** Whether overtrial occurred is a mixed question of fact and law. ***Id.***, ¶11. The circuit court's findings of historical fact that excessive litigation occurred will not be reversed unless clearly erroneous. ***Id.*** "Whether the facts as found constitute unreasonably excessive litigation resulting in overtrial is a question of law." ***Id.***

¶11 Jane argues that the overtrial finding is based on the litigation of custody and placement issues and that the circuit court specifically indicated those issues would not be considered when addressing overtrial. She claims that she was denied her opportunity to be heard on the overtrial claim because the circuit

court cut off her closing argument that her litigation approach on custody and placement was not unreasonable.[2]

¶12 At the conclusion of the parties' closing arguments the circuit court stated:

> I'll just reiterate at this point that the arguments about overtrial was—were just with respect to the property division issues and child support issues. It's not on the custody and placement issues. They all dealt with the farm and that the arguments dealt with other things, but the custody and placement litigation was not part of the argument and I'm not gonna delve into that indicating there's an overtrial situation….

¶13 The circuit court's written decision provides:

> The Court also grants Chris's counsel's request for a contribution toward attorneys fees in the amount of $7,500 based on over-trial. Among other things, the Court finds that Jane unreasonably challenged everyone from the guardian ad litem to Chris's personal injury attorney. The Court finds that anyone who dealt with Jane, including neighbors, ended up in court. This pattern continued into the divorce case where the Court finds an unnecessary

[2] We do not agree with Jane's characterization that the circuit court repeatedly indicated that litigation over the custody and placement issues would not be considered overtrial. Jane correctly points out that the circuit court terminated questions during Christopher's testimony about the involvement of a guardian ad litem and social services. However, she unfairly suggests that the circuit court did so by an expression that custody and placement would not be considered in determining if there was overtrial. At that point the circuit court was not limiting the overtrial claim to the financial issues. It was merely pointing out that the appointment of a guardian ad litem is a usual occurrence when custody or placement is at issue. The circuit court's comment was: "Well that wouldn't be—Guardian ad litem is not an overtrial situation. You know, what happens under those is another thing, but just because they got a guardian ad litem involved or a family study that's not an overtrial situation." Similarly, when the circuit court interrupted Jane's closing argument that her position on placement was not frivolous and did not constitute overtrial, the court did not make a ruling limiting overtrial considerations. The court remarked that Christopher's arguments "did not center on custody and placement. They centered on the real estate, the lack of cooperation with court orders, and the testimony and position taken in property division. [Christopher] didn't mention custody and placement." The circuit court was merely warning Jane that her argument was not responsive to Christopher's arguments.

> number of temporary hearings were generated by Jane's constant proclivity of disobeying court orders.
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> She caused an unnecessary problem with the court-ordered appraiser. She did not show up for sessions with Dr. Zosel. She did not present herself for assessment when ordered and clearly "made it a chore" to get anything accomplished. She made incredible statements concerning the impact of the divorce on her ability to work. The Court finds that she was often guilty of bending the truth to her needs. Chris's counsel's request is certainly reasonable under the circumstances because the Court finds Jane caused far more attorneys fees by her tactics than are being requested at this time. The over-trial contribution shall be paid within four months from the date of this decision.

¶14 We acknowledge that the circuit court's decision seems to partially conflict with its caveat that it would not delve into custody and placement litigation as part of overtrial. The decision mentions Jane's unreasonable challenge to the guardian ad litem, her failure to show up for sessions with Dr. Zosel, and her failure to present herself for an assessment. Those appear to be events related to custody and placement issues. However, the decision also mentions other aspects of Jane's approach which caused excessive litigation: causing an unnecessary problem with the court-ordered appraiser, making it a chore to get anything accomplished during the litigation, incredible statements she made about her ability to work, and often bending the truth to her needs. This amounts to a finding that Jane's overall lack of candor with the court permeated the entire trial. Such conduct is reflected in the record.

¶15 Jane pursued a domestic abuse restraining order but dismissed her petition after obtaining and serving a temporary restraining order and having the matter set for hearing. A contempt motion filed by Christopher requested that Jane be ordered to pay automobile and medical insurance costs as required by the temporary order. Even when represented by counsel and while the adjourned trial

was pending, Jane filed a pro se order to show cause on financial issues. There also appear of record numerous ex parte contacts by Jane. Christopher testified that on many occasions he had to respond to faxes Jane generated. He admitted that he contacted his attorney frequently because of problems Jane created, threats she made, and times when she bypassed her own attorney to file something against him. This was testimony that the circuit court found credible. The record supports the circuit court's finding that with respect to the financial matters Jane engaged in unreasonable litigation.[3]

¶16 Although the circuit court's conclusion that overtrial occurred is sound, we conclude that the circuit court failed to make a finding that the amount awarded is reasonable. It is necessary for the circuit court to determine the reasonableness of the fee regardless of whether the award is a conventional contribution order or one based on overtrial. The total fee must be found to be reasonable before the contribution is ordered. ***Johnson***, 199 Wis. 2d at 378.

¶17 The circuit court simply adopted Christopher's request for a $7500 contribution to his attorney fees. It found Christopher's request reasonable under the circumstances. We are left to wonder why that sum is reasonable. The circuit court did not make a specific finding as to the amount of time devoted to Jane's excessive litigation tactics or the reasonableness of the fees charged for the related work.

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[3] Jane contends the circuit court improperly treated the award of attorney fees as an insurance policy that can mitigate against the failure to pay debts. The circuit court was talking about maintenance and whether to waive it or leave it open when it made the "insurance policy" remark that Jane relies on. We summarily reject the contention that the circuit court had an erroneous view of the overtrial doctrine.

¶18 "The failure of a trial court to explain its reasons for reaching a particular result is reversible error or an abuse of discretion unless an appellate court can come to a reasonable conclusion from the record ...." ***Thorpe v. Thorpe***, 108 Wis. 2d 189, 198, 321 N.W.2d 237 (1982). Although Christopher presented his entire attorney's bill showing total fees of $21,763.50, it is not clear what portion of the bill is attributed to issues that were overtried. We are unable to tell from our own review of the record whether it supports a determination that $7500 in fees resulted from Jane's overtrial. Accordingly, we reverse that portion of the judgment that Jane contribute $7500 to Christopher's attorney fees and remand the case to the circuit court with directions to conduct further proceedings on this question. *See* ***Johnson***, 199 Wis. 2d at 378. The circuit court in its discretion may receive additional evidence on this issue.

¶19 No costs to either party.

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

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