COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP432 **Cir. Ct. No. 2002PA7295**

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

IN RE THE PATERNITY OF J.M.B.

MALAIKHAM BOUNPRASEUTH,

PETITIONER-RESPONDENT,

V.

DAVID LEWIS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 WEDEMEYER, P.J. David Lewis appeals from a child custody placement order. Lewis claims that the trial court erroneously exercised its discretion when it awarded primary placement of Lewis's and Malaikham

Bounpraseuth's daughter to Bounpraseuth. He argues that the trial court's decision was not based on proper facts, that it indicated a bias against him as the father of the child, that the trial court did not engage in the proper procedures, and that the statute requires the trial court to grant equal time to both parents. Because we conclude that the trial court did not erroneously exercise its discretion, we affirm.

BACKGROUND

¶2 On June 2, 2002, Bounpraseuth gave birth to a baby girl and named her Juliana. Lewis, who was Bounpraseuth's boyfriend at the time, was present for the birth. Problems arose shortly thereafter, causing a break-up between Bounpraseuth and Lewis. The state filed a paternity action on November 19, 2002. On February 5, 2003, paternity was adjudicated based on written acknowledgement from both parties.

¶3 A court commissioner entered a temporary order awarding joint custody and primary placement with Bounpraseuth. Lewis was given a limited placement schedule. The parties were referred to mediation. When the parties returned to court on April 8, 2003, the court was advised that mediation failed as the parties were not able to agree as to placement issues. At this hearing, Lewis's placement was extended and the matter was referred to the circuit court for final determination of custody and placement, pursuant to WIS. STAT. § 767.46 (2003-04).[1]

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

¶4 On April 14, 2003, the circuit court appointed Attorney Debra Rash to act as *guardian ad litem* for Juliana. On April 21, 2003, Lewis filed a motion seeking a *de novo* review of the court commissioner's April 8, 2003 order. The court set the motion for hearing on July 7, 2003.

¶5 On May 27, 2003, the court held a status conference. The court ordered the parties into communication counseling with a therapist and adjourned the July 7th hearing date. Over the summer of 2003, the matter was adjourned by agreement of the parties by their attorneys. During this time, the court held status conferences, and the attorneys attempted to negotiate an acceptable resolution. At the status conference on July 15, 2003, the court ordered the parties to file a parenting plan, pursuant to WIS. STAT. § 767.24(1m) by August 31, 2003. The court also set the matter for trial to occur on October 28, 2003.

¶6 On October 28, 2003, the court allowed Lewis's attorney to withdraw, leaving Lewis to proceed *pro se*. The matter was tried to the court on May 11, 2004, and July 27, 2004. Lewis sought equal placement—50/50. After hearing from all the witnesses, the trial court awarded joint custody, with primary physical placement with Bounpraseuth. The trial court set placement with Lewis as every other weekend from 5:00 p.m. Friday until 7:00 a.m. Monday and every Tuesday from 5:30 p.m. to 8:30 p.m. The placement decision included giving Lewis three full weeks of his choosing and set a shared holiday schedule. An order to this effect was entered. Lewis appeals from that order.

DISCUSSION

¶7 Lewis's primary complaint is that the trial court erroneously exercised its discretion in setting the placement schedule. He contends that the trial court did not consider the proper factors, that it should have awarded a

placement closer to a 50/50 split and that it could have made the schedule slightly more fair by allowing him to have his daughter overnight on Tuesday nights. He also contends that the trial court erred procedurally by merging the statutory review with his appeal to the trial court for a *de novo* review.

¶8 In reviewing child custody and placements determinations, this court's review is limited. *See* ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992). The trial court properly exercised its discretion when it stated its reasons, based its decision on the pertinent law and the relevant facts in the record, and reached a reasonable determination. ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996).

A. Maximizing Placement.

¶9 Lewis's first contention is that the trial court failed to apply the statutory directive of WIS. STAT. § 767.24(4)(a)2. to "maximize[] the amount of time the child may spend with each parent …." Although this court can certainly understand Lewis's frustration with the trial court's decision to split time between father and mother 27%/73%, particularly in light of Lewis's request for 50/50 time, we cannot say that the trial court's decision ignored the statutory directive referenced above.

¶10 The trial court directly addressed this argument in its decision:

> Before discussing the factors and how they apply to this case, the Court at the onset notes that contrary to Mr. Lewis' repeatedly stated position, neither the statute nor the constitution creates a presumption for equal placement. See Arnold v. Arnold 270 Wis. 2d 705 …. Mr. Lewis' reliance on cases involving contests between parents and third parties, such as grandparents or the State, is simply misplaced. So is his attempt to equate the imposition of a less than equal placement schedule with a termination of parental rights in which a parent must be found unfit before

> rights may be terminated. The governing law [for Juliana's case] is found in Chapter 767, and its applicability has been upheld and clarified in the Arnold decision. Regarding the statute, [the] mandate to maximize placement and ensure regu[l]arly occurring periods of meaningful placement is certainly a guide to courts and shows a legislative intent to provide both parents with an important role in a child's life, but there is simply no presumption for equal placement that a court must overcome before setting a different schedule.

¶11 The trial court's discussion of this issue was correct. The case law, in interpreting that portion of the statute, holds "that while there is a statutory presumption of legal custody, there is no provision establishing a presumption of joint placement." ***Arnold v. Arnold***, 2004 WI App 62, ¶2, 270 Wis. 2d 705, 679 N.W.2d 296 (citing ***Keller v. Keller***, 2002 WI App 161, ¶¶12-13, 256 Wis. 2d 401, 647 N.W.2d 426). The court is obligated to provide "regularly recurring and meaningful" placement, but there is no requirement that such placement be split equally between the parties. ***Id.*** Thus, the trial court did consider this statutory directive in assessing all the statutory factors pertinent to this case.

B. Trial Court's Rationale.

¶12 Lewis next contends that the trial court's placement split of 27%/73% "irrationally limited Juliana's time with her father simply to minimize the number of placement exchanges." Lewis also argues that this was the primary factor upon which the trial court based its decision. We cannot agree.

¶13 In setting the placement schedule, the trial court addressed all of the pertinent statutory factors. Although the trial court did state its concerns that too many transitions could increase potential conflict, this was in relation to WIS. STAT. § 767.24(5)(am)10—cooperation and communication between the parties. The record does reflect some acrimony between the parties, which supports the trial court's concern. Bounpraseuth testified about problems between the parents

and incidents during placement exchanges or doctor's visits. Thus, the trial court did not err in considering this factor in the fashion which it did.

¶14 The transcript reflects that this was not the primary factor on which the trial court based its decision. Rather, the trial court explicitly addressed each of the statutory factors and how they should be applied to the facts of this case.

C. Father Bias.

¶15 Lewis also contends that the record reflects that the trial court was biased against him. He recites a variety of incidents where he and Bounpraseuth received disparate treatment, including the initial limited visitation order and response to failure to pay the *guardian ad litem* costs. Although this court can certainly understand Lewis's frustration with the system, we cannot conclude, based on the record presented, that the trial court's ultimate decision reflected bias against him.

¶16 In determining whether a trial court was fair and impartial, we apply a two-part test: "(1) a subjective test based upon the judge's own determination of his or her impartiality and (2) an objective test based upon whether impartiality can reasonably be questioned." ***Scott Y. v. St. Croix County***, 175 Wis. 2d 222, 229, 499 N.W.2d 218 (Ct. App. 1993). Our application of this test is a question of law. ***Id.***

¶17 Here, we can find no evidence of a pattern of bias against Lewis. The transcripts demonstrate the trial court's repeated attempts to assist Lewis as he proceeded *pro se* through the case. The fact that the trial court did not order the equal placement requested by Lewis does not make the trial court biased.

¶18 We do acknowledge that Lewis's position of making his Tuesday placement an overnight would have adjusted the placement percentage to 42%/58%. The adjustment, as Lewis points out, would not require an additional child exchange between the parents. However, Lewis does not acknowledge that the trial court awarded him three full weeks (of Lewis's choosing) of uninterrupted placement. Our role is not to make the placement decision, but to review whether the placement decision made by the trial court constituted an erroneous exercise of discretion. We cannot conclude, based on this record, that the trial court's placement decision was erroneous. The trial court's decision placed Juliana with Lewis every other weekend from 5:30 p.m. Friday until 7:30 a.m. Monday, which meant for three nights of that week, Lewis would be the parent putting Juliana to sleep and his would be the first face Juliana would see when she woke up in the morning. The trial court included a three-hour placement every Tuesday, and three extra full weeks above the regular placement schedule to spend with Juliana from noon Sunday to the following Sunday at noon. The trial court also ordered a 50/50 shared holiday schedule.

¶19 Although this schedule does not result in a complete 50/50 split of Juliana's time between parents, as the trial court stated: "[I]t is important to reiterate Juliana is not a piece of property to be sliced equally and that a parent's insistence on his or her rights can become an excuse to engage in a low level war that ends up destroying a childhood which can never be regained."

¶20 As this court stated in ***Arnold***, it is also important to: "remember that Wisconsin has given its courts the *responsibility* to arbitrate disputes involving custody and arrive at a solution which, in the courts' exercise of discretion, is in the children's best interests." ***Id.***, 270 Wis. 2d 705, ¶12. The record in this case reflects that the lower courts offered Lewis repeated

opportunities to resolve the placement dispute without forcing the court to make the decision. The parties were unable to agree, and thus, must now be bound by the decision made here. In sum, we conclude that the record does not establish any bias toward Lewis and the trial court did not erroneously exercise its discretion in rendering its placement decision.

D. De Novo Review.

¶21 Lewis's last claim is that the trial court erred by merging the statutory WIS. STAT. § 767.46 review with his request for a *de novo* review of the temporary placement order. Lewis's objection was that the temporary order placed Juliana in his care for only seven hours a week initially, and later only fifteen hours a week, thereby greatly limiting his parental role for the first year of her life.

¶22 Although this court can certainly understand Lewis's anger and pain from the temporary orders limiting his time with Juliana and from the repeated delays, we cannot conclude, based on the record before us, that the trial court committed any error requiring reversal by this court.

¶23 As in any legal proceeding, the process is not as swift as one would like. As pointed out in the briefs, the repeated delays in this case were attributed to agreed postponement by the parties, the court's congested calendar, or the desire to afford the parties an opportunity to resolve placement issues without forcing the court to make the decision.

¶24 After Lewis dismissed his attorney and decided to proceed *pro se*, he requested a *de novo* review hearing of the commissioner's temporary orders via a letter dated January 26, 2004. The trial court consolidated the *de novo* requested

with the statutory trial, which took place May 11, 2004, and July 27, 2004. Given the repeated delays in this matter, it can be inferred from the record that the trial court determined the quickest way to resolve the *de novo* request would be to combine the *de novo* review with the WIS. STAT. § 767.46 review. Given the procedural history of this case, we cannot conclude that the trial court's decision to combine these two reviews into one proceeding constituted error. In many ways, the decision was logical because the subject matter, the parties, and all the evidence related to the sole dispute as to a placement decision. We do note, nonetheless, that a *de novo* review of a court commissioner's temporary order should be treated with expedited consideration. As was the case here, the initial order provided Lewis with only seven hours of visitation a week. These circumstances suggest that prompt review by the circuit court should be a priority. Moreover, treating the *de novo* request as a separate procedural matter from the statutory trial would offer this court a better opportunity to review such matters.

¶25 Having said that, we cannot conclude that the trial court's merging of the *de novo* review and the statutory trial constituted error in the instant case. The delays and adjournments in this case were agreed to, a product of the specific facts and circumstances, or for a good reason. Based on the foregoing, we affirm the trial court's order.

By the Court.—Order affirmed.

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