

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

December 5, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

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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.

**No. 00-0712**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**ERIC D.B.,**

**PETITIONER-APPELLANT,**

**v.**

**DENISE L.B.,**

**RESPONDENT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Pierce County:  
DANE F. MOREY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. This case comes before us following a remand for a custody determination. On remand, the trial court ordered that the sole legal custody and primary placement of the two oldest children remain with their father, Eric D.B. The court transferred sole legal custody and primary physical placement of the two youngest children to their mother, Denise. Eric argues that the court erroneously exercised its discretion by transferring legal custody and primary placement of the two youngest to Denise, and by setting a placement schedule that interferes with week-night church meetings. Because the record supports the court's exercise of discretion, we affirm the judgment.

¶2 The parties were married in 1979. In 1996, this divorce action was filed and, pursuant to a temporary order, the parties' four minor children resided with Eric during the pendency of the action. At the final hearing in 1997, Denise repudiated a written stipulation awarding legal custody and primary placement of the children to Eric. The trial court rejected her repudiation and entered judgment on the stipulation. Denise appealed. We reversed the custody determination and remanded for further proceedings.

¶3 At the time of the 1999 custody trial, the children were ages seventeen, sixteen, ten and nine. The guardian ad litem recommended that the two older boys stay with the father, and that custody and primary placement of the two younger children, a boy and girl, be transferred to their mother. He further recommended that every other weekend the younger children visit their father and continue their church activities with him during their visits.

¶4 The trial court accepted the guardian ad litem's recommendation. In so doing, it observed that "[u]nfortunately, this has been a bitter child custody matter for years." The court explained:

[T]he father has taken a course of action since she has moved out of almost shunning the mother because of his belief of her immoral acts. And I believe he has poisoned the two older boys against their mother as a result because that's manifested by their conduct.

....

This has been a horrible thing that's been done to these children. I think mother was irresponsible in the way she moved out. But maybe she was at her wit's end. ...

And so I am finding that, first of all, that it is in the best interests of the children that these two older--the two boys--sole legal custody will be with the father because I am of the opinion that these two simply cannot agree on serious matters concerning the lives of those two older boys. And I think someone needs to be in charge of the ship. And that means that it should be Eric because those boys aren't going to go over to mother anyway. ...

....

As to the two younger children, the Court finds it's in the best interests of those two younger children based primarily upon the father's own testimony that [they] are very close and need and want to be together, that they should go to the same place and they ought to go with their mother because of their ages, because the mother has spent a great deal of time with them. ...

I am concerned that, if they aren't with their mother, that they, too, will become poisoned. I really feel there's been a poisoning here. I have never said that in any case ever. But there has been poisoning here. And I don't want those children to be poisoned.

¶5 The court observed that the father lacked control of his temper and that was not in the best interest of the children. It stated: "I will not allow you to use it to intimidate everyone around you." The court noted: "I have noticed every time anything bad was said about the mother, there was a smile and a glint came into his eyes during this hearing. That was very telling to me."

¶6 Eric argues that the trial court erroneously exercised its discretion because it failed to apply the appropriate factors under WIS. STAT. § 767.24(5)<sup>1</sup>; failed to make findings of fact and conclusions of law; applied an erroneous rule of law and “disregarded the overwhelming, uncontradicted evidence which showed the children were thriving in the father’s care and that the evidence supported the mother’s relationship with the children or the consequences thereof were her own doing.” We are unpersuaded.

¶7 “An appellate court must give great weight to the circuit court’s determination as to custody.” *Gould v. Gould*, 116 Wis. 2d 493, 497, 342 N.W.2d 426 (1984). The custody determination will be reversed if the appellate court is convinced that the findings of fact upon which the custody determination is based are clearly erroneous, or that the custody determination represents a clear abuse of discretion. *See id.* at 498. We will not reverse a discretionary determination “if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court’s decision.” *Prahl v. Brosamle*, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). “Indeed ... we generally look for reasons to sustain discretionary decisions.” *Burkes v. Hales*, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991) (footnote omitted).

¶8 A custody determination depends on first-hand observation and experience with the persons involved. *See Gould*, 116 Wis. 2d at 497. The trial court, not the appellate court, judges the credibility of witnesses and the weight of their testimony. *See* WIS. STAT. § 805.17(2). Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

support findings the trial court did not but could have reached. *See Estate of Dejmal*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the superior opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. *See id.* at 151-52.

¶9 The record discloses that the facts alleged in this custody dispute were hotly contested. Denise testified that Eric was a construction worker during the marriage and, when he was out of work, his temper was out of control. She recalled that in 1983, Eric became physically abusive to her, and “took to shoving, pushing, choking, tossing me around by my hair, things of that nature.”

¶10 Denise also remembered that Eric would tell her that she was stupid and crazy, and he would punch her and throw her against the wall. He threatened her by punching holes in the walls of their home, stating, “[b]e glad that isn’t you.” She stated that when she was pregnant with her second youngest, he put an extension cord around her neck and started to choke her with it. One time, when the dining room table was set with food and dishes, he threw it over.

¶11 Denise testified that Eric was abusive to the children as well. She recalled that Eric took their son out of the crib when he was six months old and spanked him. She stated that when one of the older boys was five, he was caught playing with matches. Eric hit the child, resulting in bleeding from the child’s mouth and nose. Denise also testified that Eric used a belt to discipline the children.

¶12 As a result of living in fear, Denise developed Crohn’s disease and bleeding ulcers. She testified that Eric’s abusive behavior continued until the spring of 1996, at which time the parties separated. When she left, she notified the social services department of Eric’s “neglect.” Near that time, Denise met a man

with whom she developed a relationship and to whom she is now married. Denise testified that at that time she began treatment for battered woman's syndrome and depression.

¶13 Denise stated that after their separation, Eric would, in front of the children, use the terms "slut" and "whore" to describe her when she would come to visit the children. Before the separation, she believed she had a good relationship with her children. After she left the home, however, the two older boys began using abusive names to her, calling her the same names that their father did. They threw rocks at her car. They stopped speaking to her. Their father took the children to church, where it was publicly announced in the children's presence that their mother was "disfellowed."

¶14 At trial, Eric denied the abuse and testified that Denise left home because she wanted to "go out and have fun and go to parties and go drinking and sleep with other men." He stated that Denise treats the children unfairly. Eric also denied poisoning the older children against their mother.

¶15 It is apparent that the trial court found Denise's testimony to be credible and resolved conflicts in her favor. *See State v. Echols*, 175 Wis. 2d 653, 672, 499 N.W.2d 631 (1993) ("An implicit finding of fact is sufficient when the facts of record support the decision of the trial court."). Thus, the court implicitly considered evidence of domestic abuse and Eric's methods of discipline. *See* WIS. STAT. § 767.24(5)(h) and (i).<sup>2</sup> Also, the court considered the children's interaction

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<sup>2</sup> WISCONSIN STAT. § 767.24(5) provides:

(5) FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS. In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one

(continued)

with their parents and siblings, *see* § 767.24(5)(c), and Eric’s unreasonable interference with the children’s relationship with Denise. Because the court considered appropriate factors under § 767.24(5) and the record demonstrates a rational basis for the court’s decision, we do not overturn it on appeal.

¶16 Eric nonetheless argues the court erroneously foreclosed joint legal custody. He contends that “[t]here existed no conditions at the time which would substantially interfere with the exercise of joint legal custody” and that the court was “flat out wrong” in its finding that this has been a bitter custody dispute for years. Eric’s argument disregards Denise’s testimony. From her testimony, the court was entitled to infer that Eric interfered with her relationship with the children. The court’s credibility assessments will not be overturned on appeal

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potential custodian over the other on the basis of the sex or race of the custodian. The court shall consider reports of appropriate professionals if admitted into evidence when legal custody or physical placement is contested. The court shall consider the following factors in making its determination:

- (a) The wishes of the child's parent or parents.
- (b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
- (c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
- (d) The child's adjustment to the home, school, religion and community.
- (e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.
- (f) The availability of public or private child care services.
- (g) Whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.
- (h) Whether there is evidence that a party engaged in abuse, as defined in s. 813.122(1)(a), of the child, as defined in s. 48.02(2).
- (i) Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20(1m) or domestic abuse as defined in s. 813.12 (1)(a).
- (j) Whether either party has or had a significant problem with alcohol or drug abuse.
- (k) Such other factors as the court may in each individual case determine to be relevant.

unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶17 Eric further contends that after the separation, the children observed their mother being affectionate with another man and therefore their bitterness is her doing, not his. Denise, however, denied these allegations. The trial court, not this court, assesses weight and credibility. *See id.* at 583-84. Eric also claims that the court erred when it found that he had “almost shunned” Denise because of her immoral acts. We disagree. The court could make this inference based upon Denise’s testimony that Eric called her a “slut” and “whore” in front of the children. Also, there is no dispute that Eric took the children to the church meeting that publicly “disfellowed” Denise. Without belaboring the testimony, our review of the record satisfies us that the court was entitled to reach this inference based upon credibility grounds.

¶18 We also reject Eric’s contention that it is undisputed that the “overwhelming, uncontradicted evidence” showed that “the children were thriving in the father’s care.” This is a factual matter, and the court implicitly rejected this characterization of the record. Eric himself testified that his two older children did not respect his new wife and had problems with discipline. Also, they had conduct difficulties such as the rock throwing incident, name calling and refusing to communicate with their mother. The record is far from establishing that the children were indisputably “thriving” in Eric’s care.

¶19 Eric further contends that the court erroneously failed to reason how its order would meet the children’s best interests. We disagree. The court accorded great weight to the youngest children maintaining a relationship with



their mother. In performing a discretionary function, giving consideration to various factors involves a weighing and balancing operation, but the weight to be given a particular factor in a particular case is for trial court, not the appellate court to determine. See *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). We conclude that the court's reasoning demonstrates a proper exercise of discretion.

¶20 Next, Eric claims that the court used the wrong legal standard because it should have treated the action as one for a transfer of custody instead of an initial custody determination. See WIS. STAT. § 767.32(2). We disagree. Because the initial custody determination based upon Denise's repudiated stipulation was reversed, the trial court correctly treated the case as an initial custody determination. Eric's argument fails to demonstrate reversible error.

¶21 Eric argues that the trial court erred when it denied his motion for reconsideration. Eric's motion alleged that the court made mistakes of fact, and that Denise committed fraud on the court and did not respect his religious beliefs. The guardian ad litem pointed out that many items Eric raised occurred after trial and that a modification motion, not a reconsideration motion, would have been appropriate.

¶22 The court stated, "Many of the issues you raise are not something a Court can resolve because of the religious differences here." It explained:

If you really want to help your people, they need to get into some kind of counseling where they can somehow come to grips with ... how the varying lifestyles and religious beliefs have to be resolved--I don't know how a Court can do that ... successfully. It's going to hurt no matter how I decide.

¶23 The trial court determined that it was not going to re-try the custody dispute and stood by its previous ruling. Because the court's custody determination relied heavily on its credibility assessments, we conclude that its denial of Eric's reconsideration motion was not error.

¶24 Finally, Eric argues that the court erred by setting the periodic placement schedule. He contends that the schedule that permits visits on alternative weekends effectively eliminates week-night church meetings that are important to the children's upbringing. Eric's affidavits and supporting papers indicate that he wants to take the two youngest children to church meetings on Tuesday nights, Thursday nights, and Sundays. Denise objected, because the children were not going to return home until 10:30 on Tuesday nights and 11:30 on Thursday nights, and she felt that was too late.

¶25 We conclude that the record provides a rational basis for the court's decision. The court stated that the religious conflicts were problems that the parties should resolve through counseling. The periodic placement order represents a balancing of the parties' and children's interests. The court could reasonably conclude that the mother, as sole legal custodian of the two younger children, should make decisions regarding the children's weeknight activities and bedtimes. The record fails to support Eric's claim of error.

*By the Court.*—Judgment affirmed.

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



