COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2694 **Cir. Ct. No. 2003FA198**

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

IN RE THE MARRIAGE OF:

STEVEN J. SCHUETTE,

PETITIONER-RESPONDENT,

V.

REBECCA C. GROSS-SCHUETTE,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

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

¶1 BROWN, J. Rebecca Gross-Schuette appeals an order reducing the amount of weekly time that she has physical placement of her son, Samuel. Her former husband, Steven, moved for modification of the placement schedule for their two-and-a-half-year-old son after Rebecca reported hearing a voice telling her to suffocate the child. Under Wisconsin's "truce" statute, a physical placement order instituted as part of a divorce may not be modified within two years except where the court finds by substantial evidence that the modification is necessary to prevent physical or mental harm to the child's best interest. Because we hold that the circuit court permissibly exercised its discretion in modifying the schedule, we affirm.

¶2 Rebecca Gross-Schuette and Steven Schuette were divorced by judgment granted May 25, 2004. The court awarded joint legal custody of their then 18-month-old son, and instituted a physical placement schedule putting the child with Rebecca during the day on Monday and Wednesday and overnight on every Tuesday and every other Saturday.

¶3 Rebecca has had clinical depression with some psychotic features since 2002. Her mental illness has involved thoughts of harming herself and her son and has resulted in placements within a locked facility and halfway houses. During and after the divorce proceedings, she was subject to a WIS. STAT. ch. 51 commitment order. Because of this, Rebecca's placements with Samuel were subject to supervision by her parents and other conditions.

¶4 In November 2004, Rebecca heard a voice or voices which instructed her to suffocate Samuel. She was hospitalized, and in January 2005, Rebecca entered into a protective plan with Child Protective Services whereby all

overnight placements with her son were suspended. That plan expired on July 10, 2005.

¶5 On April 13, 2005, Steven moved the court to revise the custody and placement order, seeking sole legal custody and requesting that the terms of the Child Protection Services agreement, including the termination of overnight placements with Rebecca, be incorporated into a new placement order. The circuit court held hearings on the matter in August and September 2005.

¶6 At the hearings, Steven called Sheboygan County Department of Health and Human Services social worker Jana Harrington. Harrington testified that over the duration of the protective plan, the department had been concerned with Samuel's safety under Rebecca's care and had therefore allowed daytime but not overnight placement. She also testified that when the order expired on July 10, she believed that overnight placement continued to be inappropriate.

¶7 Rebecca called Eric Brunnich, also of the Sheboygan County Department of Health and Human Services, who testified that Rebecca's auditory hallucinations continued, but that she had not heard voices instructing her to harm Samuel since the November 2004 incident. He stated that it was not possible to predict when or whether such an incident might occur again. It was his opinion, however, that cutting back on overnight placements was not an appropriate means of protecting the child's safety.

¶8 Rebecca also called Cynthia Pritzl, a psychotherapist at Health and Human Services who had been treating Rebecca. She, too, testified that she believed the overnight visits were not a threat to Samuel and that they should be reinstated.

¶9 At the close of the hearings, the circuit court announced that it would modify the placement plan by terminating Rebecca's overnight Tuesday placements but allowing the Saturday overnights to continue. The judge stated as follows:

> I think there is substantial evidence that a modification of the placement order is necessary to protect Samuel, and here is what it is: In November there was a significant episode where either Rebecca heard voices or had feelings about harming Samuel. They were strong enough that they scared her, and appropriately so scared her and others to the extent she needed inpatient treatment. That mental illness and treatment continues.
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> I think it is a tribute to her courage in getting treatment, to the generosity of Mr. Schuette, to the involvement of the grandparents, and the health care professionals in this community that we can have the extensive placement schedule that we have including the Saturday nights. Certainly, without those protections in place and the cooperation of all of those parties, we couldn't be doing this. Mr. Darrow, I agree with almost all of what you say about her courage and her progress, but the incident is what it is.

¶10 The court entered an order giving Rebecca placement on Mondays, Tuesdays, Wednesdays, and overnight on alternating Saturdays. Rebecca appealed. We remanded the case to the trial court for additional findings and ordered briefing from the child's guardian ad litem. The findings and brief have been submitted and reviewed. We now affirm.

¶11 We must address two preliminary matters before moving to the substance of WIS. STAT. § 767.325(1)(a) (2003-04).[1] First, Rebecca suggests that this case requires only that we apply the law to undisputed facts and that we must

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

therefore review the matter without deference to the circuit court. We cannot agree. Though the parties agree about the relevant events and when they occurred, deciding whether a particular custody or care arrangement is harmful to a child involves assessing the credibility of witnesses and the conduct of the parties involved. This is why our supreme court has held that placement modifications under § 767.325(1)(a) are within the discretion of the trial court.[2] ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 764-65, 498 N.W.2d 235 (1993) (Custody modifications are "peculiarly within the jurisdiction of the trial court, who has seen the parties, had an opportunity to observe their conduct, and is in much better position to determine where the best interests of the child lie than is an appellate court." (quoting ***Hamachek v. Hamachek***, 270 Wis. 194, 202, 70 N.W.2d 595 (1955))). We must affirm unless that discretion was erroneously exercised. ***Andrew J.N.***, 174 Wis. 2d at 764. As such, we review only to determine whether the trial court examined the facts of record, applied a proper legal standard, and, using a rational process, reached a reasonable conclusion. ***Id.*** at 766. We will reverse the trial court only if there is no reasonable basis for its decision. ***Id.***

¶12 Second, the parties dispute whether the modified placement schedule "substantially altered" the time Rebecca was allowed with her son. If it did, then WIS. STAT. § 767.325(1)(a) requires a finding by substantial evidence that the

[2] Rebecca points to ***Trost v. Trost***, 2000 WI App 222, ¶4, 239 Wis. 2d 1, 619 N.W.2d 105, in which we stated that whether a court had authority to modify a placement order within two years was a question of law appropriate for de novo review. The trial court in ***Trost*** made an explicit finding that there was no physical or mental harm to the child but modified the placement order anyway because it had misread WIS. STAT. § 767.325(1)(a) as not applying to physical placment orders. ***Trost***, 239 Wis. 2d 1, ¶5. The issue there was one of pure statutory construction. ***Trost*** does not control this case because the trial court here applied the correct statute and the dispute is over the finding of harm itself. As ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 766-67, 498 N.W.2d 235 (1993), made explicit, this finding is committed to the trial court's discretion.

change of schedule was necessary because of conditions physically or emotionally harmful to the child's best interest.[3] Rebecca points out that the new schedule takes away two-thirds of her overnight placements with her son, while Steven argues that much of the "lost" time would be spent in separate rooms sleeping. In view of our conclusion that the circuit court properly found the original schedule physically harmful to the child's best interest, resolving this question is not essential to our result. We will assume without deciding that the circuit court's order substantially altered Rebecca's placement time with her son and must therefore conform with § 767.325(1)(a).

¶13 The Supreme Court of Wisconsin has described that statute's requirements as follows:

> Section 767.325(1)(a), Stats., contains four elements: (1) substantial evidence, (2) that the modification is necessary, (3) because the current custodial conditions, (4) are physically or emotionally harmful to the best interest of the child. "Substantial evidence" refers to evidence which is "considerable in amount, value or worth."

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[3] WISCONSIN STAT. § 767.325(1)(a) reads in relevant part:

> Except as provided under sub. (2), a court may not modify any of the following orders before 2 years after the initial order is entered under s. 767.24, unless a party seeking the modification, upon petition, motion, or order to show cause shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child:
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> …
>
> 2. An order of physical placement if the modification would substantially alter the time a parent may spend with his or her child.

> "Necessary" embodies at least two concepts. First, the modification must operate to protect the child from the alleged harmful "custodial conditions." Second, the physical or emotional harm threatened by the "current custodial conditions" must be severe enough to warrant modification.

Andrew J.N., 174 Wis. 2d at 760-61 (citations omitted).

¶14 Rebecca submits that we must reverse the circuit court's order because there was no evidence that the current custodial conditions were harmful to Samuel. She further argues that the court improperly substituted its judgment about Rebecca's mental health for that of the testifying experts, and that this is not permitted under ***Andrew J.N.***

¶15 We think that the record contains ample evidence, both testimonial and documentary, for the court reasonably to conclude that there existed a threat of harm to Samuel. It is undisputed that in November 2004, due to her mental illness, Rebecca had posed a danger to the life of her child. Though she had taken steps to treat her illness, and had made progress, and though some protections had been instituted to protect the child during her placement times, there was testimony that her symptoms continued and that at least one Health and Human Services worker believed that, when the child protection plan expired in July 2005, overnight visits continued to be inappropriate. Another testified that it was impossible to predict whether or when a potentially harmful relapse might occur. Under these circumstances, it was within the court's discretion to find that there

was substantial evidence that the original placement schedule was physically harmful to the best interest of the child.[4]

¶16 As for the contention that the court improperly substituted its judgment for that of the experts regarding Rebecca's mental health, we do not think that ***Andrew J.N.*** stands for the proposition that Rebecca urges. In that case, the circuit court rested its modification of a physical placement order in part on its assessment that the mother's mental health was harmful to the child. The court found the mother to be mentally unstable because of her behavior in and out of court and her failure to complete a psychiatric assessment. ***Id.*** at 772-73. The supreme court reversed, saying, "[T]he trial court is not an expert in mental health. It is not qualified to determine the mother's mental health and is not qualified to determine whether the mother's mental health is emotionally harmful to the best interests of the child." ***Id.*** at 772. The court went on to state that the evidence available to the trial court would not suggest to a layperson that the mother was mentally ill. ***Id.***

¶17 Unlike ***Andrew J.N.***, this is not a case of an inexpert court proffering its own mental health diagnosis without sufficient evidence. Here, there is universal agreement that Rebecca has had and continues to have a mental illness,

[4] This is not to suggest that Rebecca actually physically harmed her son in any way. All of the witnesses testified that she provided good care to him and that continued contact with her son was beneficial both to the son and to Rebecca. For obvious reasons, the law does not require that serious harm actually come to pass before the custodial conditions can be found harmful to the child's interest. The situation here is analogous to a hypothetical situation described in ***Andrew J.N.***, 174 Wis. 2d at 761-62: "There is generally no need to prove that the child has actually suffered harm. Obviously, if a child is kept in squalid and unsanitary conditions, a concerned parent is not required to wait until the child becomes sick before seeking a modification." The court went on to state that the seriousness of the threatened harm weighs in the analysis of whether a modification is "necessary." ***Id.*** at 762. Here, the potential harm to the child is clearly of the most serious sort.

that this illness has in the past caused her to be a threat to Samuel, and that relapse is possible and cannot be predicted. It does not require an expert to conclude that this situation poses a threat of physical harm to Samuel. To be sure, there was testimony from mental health experts that overnight placements did not pose a risk to Samuel. There was also, however, testimony from another expert that overnight visits were not appropriate. When presented with conflicting expert testimony, the trial court is the ultimate arbiter of credibility. ***Schorer v. Schorer***, 177 Wis. 2d 387, 397, 501 N.W.2d 916 (Ct. App. 1993). The circuit court's findings make clear that it found the latter testimony more persuasive, and we may not substitute our own judgment.

¶18 Turning to the remaining element, that the modification must be "necessary," we have no doubt that the second prong, that the potential harm to the child be severe enough to warrant modification, is met. In view of Rebecca's admitted past urge to suffocate the child, the potential harm at issue is grave.

¶19 However, the first prong of "necessity," that the modification operate to protect the child from the potential harm, gives us some pause and was the major factor in our decision to remand for further findings and briefing. If, as the trial court found, overnight placements posed a risk to the child, why did the new placement schedule abolish overnight placements on Tuesdays but retain them on Saturdays? Indeed, Rebecca argues that this inconsistency shows that the true motivation for the modification was a discriminatory desire to "punish" her for her mental illness.

¶20 The additional findings we received from the trial court, however, show that it considered the testimony about the threat to Samuel and decided to institute the new schedule as a part of a "step-by-step" approach. The guardian ad

litem pointed out in his brief that Rebecca's WIS. STAT. ch. 51 commitment had only recently expired and so she had had little opportunity to demonstrate that she could comply with her treatment outside of the highly structured supervision regime. If Rebecca's condition continued to be stable, the placement times could be expanded in the future. The reduction, rather than elimination, of overnight placement was the court's attempt to balance its safety concerns with the desire to maintain contact between mother and child.

¶21 We cannot say that the arrangement chosen by the circuit court completely allays our concern about Samuel's safety. However, Steven has not appealed this portion of the order, and further, we are bound to defer to the trial court, to whom such discretionary decisions are committed. ***Andrew J.N.***, 174 Wis. 2d at 765 (custody modifications are "peculiarly within the jurisdiction of the trial court").

By the Court.—Order affirmed.

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