COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3105-FT **Cir. Ct. No. 2002FA167**

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

IN RE THE MARRIAGE OF:

NICHOLAS P. METROPULOS,

PETITIONER-RESPONDENT,

V.

RAEANN MARIE METROPULOS, N/K/A RAEANN MARIE MOES,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Reversed.*

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

¶1 CANE, C.J.[1] RaeAnn Moes appeals an order modifying her children's placement during the summers, pursuant to a motion brought by her former husband, Nicholas Metropulos. Moes argues the court erroneously exercised its discretion when it modified the order on the basis of the guardian ad litem's report and did not receive any evidence from her former husband. We agree and reverse the order.

BACKGROUND

¶2 Metropulos and Moes were divorced on May 2, 2003, and have two minor children. Metropulos has had primary physical placement of the children since the divorce. Shortly after the divorce, Moes moved to California. She accepted eight weeks of physical placement in the summer in California. During the school year, she had the option for additional placement in Rhinelander, Wisconsin of one week each month or two weeks every other month.

¶3 Both parties subsequently moved to modify the placement order. On February 15, 2006, Metropulos moved the court to adopt the guardian ad litem Charlene Cervenka's recommendations regarding summer placement of the children. On May 31, 2006, the court conducted a telephone hearing concerning summer visitation. At that hearing, the court suspended Moes' summer visitation rights "based upon the information received by the Court from the guardian ad litem…."

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 The hearing on Metropulos's motion was eventually held on August 29, 2006. Prior to the hearing, but in an untimely manner, Moes also moved the court for a modification of the placement order. In preparation for the hearing, the guardian ad litem produced a letter and recommendations with numerous attachments. At the hearing, the court ruled Moes' motion was untimely and would not be heard on that date. The court reviewed the guardian ad litem's letter and recommendations prior to the hearing and relied on both in reaching its ultimate decision in this case. Metropulos stated he agreed with the recommendations of the guardian ad litem and did not present evidence. The court, in adopting the guardian ad litem's recommendations, modified the order to allow Moes four weeks in the summer.

DISCUSSION

¶5 We review modifications of placement orders to determine if the decision reflects a reasonable exercise of discretion. ***Goberville v. Goberville***, 2005 WI App 58, ¶18, 280 Wis. 2d 405, 694 N.W.2d 503. "We will sustain discretionary acts as long as the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.***, ¶7.

¶6 Moes argues the circuit court erroneously exercised its discretion when it modified the amount of time she would spend with her children by adopting the report of the guardian ad litem without receiving any evidence from either party. We agree.

¶7 To modify the children's placement in this case, Metropulos must establish (1) "[t]he modification is in the best interest of the child[;]" and (2) "[t]here has been a substantial change in circumstances since the entry of the

last order affecting legal custody or the last order substantially affecting physical placement." WIS. STAT. § 767.325(1)(b)1 (2003-04).[2]

¶8 Here, both parties made motions to alter the physical placement of the children. On appeal, neither party can assert that there has not been a substantial change in circumstances. By making their motions, they have "effectively conceded that there was a substantial change in circumstances to merit placement modification under WIS. STAT. § 767.325(1)(b)1." ***Keller v. Keller***, 2002 WI App 161, ¶9, 256 Wis. 2d 401, 647 N.W.2d 426. While we note that Moes' motion was dismissed as untimely, we conclude that the essential assertion of her motion—that there was a substantial change in circumstances to merit placement modification—could still be considered by the circuit court in making its decision. Moes is estopped from now taking a contrary position on appeal. ***Id.***

¶9 We therefore turn to whether the court based its decision on relevant evidence. The record establishes that the court relied solely upon the guardian ad litem's report and attachments. Metropulos uses the report to support the circuit court's process and states he was willing to accept its recommendations, and therefore, presented no evidence. However, a guardian ad litem's report is not evidence. ***Stephanie R.N. v. Wendy L.D.***, 174 Wis. 2d 745, 774, 498 N.W.2d 235 (1993). At the hearing, Moes did not stipulate to the report or its contents. In fact, she objected to the use of the report and the court agreed that the report was inadmissible. Consequently, there was no evidence whatsoever upon which to base a decision.

[2] WISCONSIN STAT. § 767.325(1)(b)1 (2003-04) has been renumbered under WIS. STAT. § 767.451(1)(b)1.a (2005-06) effective January 1, 2007. *See* 2005 Wis. Act 443.

¶10 Metropulos also argues that because Moes was given the opportunity to, and chose not to, present evidence, she thereby waived any objections relating to the rulings on placements. However, because it was Metropulos's motion, he bore the burden of presenting evidence. Moes did not bear a similar burden. Therefore the court erred in exercising its discretion by modifying the children's placement without Metropulos presenting any evidence to the court.

By the Court.—Order reversed.

Not recommended for publication in the official reports.