COURT OF APPEALS DECISION DATED AND FILED

June 20, 2007

David R. Schanker
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. 2007AP113 **Cir. Ct. No. 2000FA187**

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

IN RE THE MARRIAGE OF:

ROBERT C. BIEVER,

PETITIONER-RESPONDENT,

V.

KASEE E. KRUEGER F/K/A KASEE E. BIEVER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Kasee E. Krueger appeals from an order transferring primary placement of her two sons to their father, Robert C. Biever,

and setting her child support obligation. She challenges the determination that moving the children to a different city created a substantial change of circumstances and that it is in the best interests of the children to be placed with Robert. She claims it was error to not use the shared placement formula in setting child support or reduce her obligation because of travel expenses. We affirm the order.

¶2 Kasee and Robert were divorced in 2000 and share joint legal custody of their two sons. Primary placement was with Kasee and Robert exercised overnight placement on alternating weekends and evening placement on Tuesdays and alternating Thursdays. At the end of August 2004, Kasee had plans to marry Chris Krueger and gave Robert notice of her intention to move with the children, then ages six and five from Adell, Wisconsin, to Kansas City, Missouri. Robert objected and filed a motion to modify physical placement of the children.

¶3 When Robert's motion was heard on February 1, 2005, Kasee withdrew her request to move to Kansas City and agreed to a slight increase in placement with Robert. On March 1, 2005, Kasee gave Robert notice of her intent to move with the children to Middleton, Wisconsin, a distance of 125 miles from Robert's home. Again Robert moved to change primary placement to himself. On Robert's motion, the circuit court entered a temporary order prohibiting Kasee from removing the children from their school in the Batavia school district. Kasee moved to Middleton but kept the children in their school by driving them daily between Middleton and the Batavia school. In the fall of 2005, Kasee stayed with her mother which resulted in only a twenty to thirty minute commute to school.

¶4 On December 15, 2005, the circuit court granted Robert's motion and awarded him primary physical placement. Kasee appealed. This court

summarily reversed the modification order because the guardian ad litem (GAL) had not conveyed the children's wishes to the circuit court. ***Biever v. Krueger***, 2005AP3176, unpublished order (Wis. Ct. App. Oct. 18, 2006). We remanded the matter to the circuit court for the limited purpose of having the GAL fulfill his duty under WIS. STAT. § 767.407(4) (2005-06).[1]

¶5 Immediately after receipt of our October 18, 2006 decision, the GAL interviewed the children and filed a letter report with the circuit court. On October 25, 2006, a hearing was conducted on Kasee's motion to reconsider child support, a motion which had been filed while the appeal was pending. After ruling on child support, the circuit court addressed this court's remand mandate and based on the GAL's report that the children were neutral with respect to placement, the circuit court entered anew its order granting Robert's motion for primary placement. Kasee again appeals.

¶6 We first address Kasee's contention that the circuit court lacked competency to address primary placement before remittitur of the record following this court's October 18, 2006 decision. *See* ***State v. Neutz***, 73 Wis. 2d 520, 522, 243 N.W.2d 506 (1976) (determining that the trial court has no jurisdiction to act until it receives the remittitur in this case); WIS. STAT. § 808.08(1) (when the record and remittitur are received in the circuit court, the circuit court shall take specified action as soon as possible). *See also* WIS. STAT. § 808.09 (appellate court shall remit its decision and thereupon the court below shall proceed in accordance with the decision). Whether the circuit court had authority to act is a question of law

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

that we review de novo. ***Harvest Savings Bank v. ROI Investments***, 228 Wis. 2d 733, 737-38, 598 N.W.2d 571 (Ct. App. 1999). Despite pendency of an appeal, under WIS. STAT. § 808.075(4)(d)1., a circuit court may act to revise orders for periods of physical placement under WIS. STAT. § 767.451. When a judgment or order is reversed, it is no longer of any legal effect or consequence. ***Frisch v. Henrichs***, 2006 WI App 64, ¶39, 290 Wis. 2d 739, 713 N.W.2d 139, *review granted*, 2006 WI 108, 292 Wis. 2d 409, 718 N.W.2d 723 (No. 2005AP534). Our summary reversal left Robert's motion for a change in primary placement still pending. The circuit court had authority to address it despite that the appeal may have still been pending because remittitur had not occurred.[2]

¶7 Kasee also claims that by raising the remanded mandate sua sponte the circuit court violated her due process rights to notice and opportunity to be heard. *See* ***Guelig v. Guelig***, 2005 WI App 212, ¶32, 287 Wis. 2d 472, 704 N.W.2d 916 ("At the very least, due process mandates that a party has notice, actual or constructive, that is reasonably calculated to inform him or her of the pending decision as well as an opportunity to appear and be heard with respect to the defense of his or her rights."). Kasee made no objection to the circuit court taking up the remanded issue. Although the circuit court launched directly into the issue without inviting comments from the parties, there was the opportunity at the conclusion of the court's ruling to state an objection to proceeding without notice and to request an opportunity to be heard further on the issue.[3] We have

[2] Kasee attempted to invoke the circuit court's authority before remittitur when she filed her motion to remove the GAL and strike his report. Even if the circuit court lacked competency to proceed on October 25, 2006, the written order appealed from was not entered until after remittitur.

[3] At the conclusion of the circuit court's ruling, Kasee's counsel took the opportunity to argue an additional point about child support.

acknowledged that a hearing convened for one purpose may sometimes evolve into another type of hearing. *See **id.***, ¶38. If that happens, a party should state his or her objection on the record. Kasee waived her right to claim lack of notice and opportunity to be heard. *See **Olson v. City of Baraboo***, 2002 WI App 64, ¶23, 252 Wis. 2d 628, 643 N.W.2d 796.

¶8 We reject any notion that it was wrong for the circuit court to proceed in summary fashion. Our summary disposition provided that it was within the circuit court's discretion what further proceeding would take place and that if the children's wishes are neutral, the circuit court could reenter its existing decision.[4] ***Biever***, 2005AP3176, unpublished order at 4. The circuit court did not, as Kasee contends, blindly rely on the GAL's recommendation. It made a finding that the children's wishes were neutral based on the GAL's report of his conversation with the children. We also reject Kasee's contention that it was error for the circuit court to address the question of past domestic abuse in relation to child placement at the October 25, 2006 hearing because it was beyond the scope of this court's remand. Although the circuit court was not required to conduct a new exercise of discretion in the face of the children's neutral wishes, *see **id.***, nothing prevented it from further explaining the decision it made. Public policy favors the circuit court's utilization of an opportunity to hone its analysis in aide of the appellate review process. *See **Highland Manor Assocs. v. Bast***, 2003 WI 152, ¶17, 268 Wis. 2d 1, 672 N.W.2d 709. *See also **Tietsworth v. Harley-Davidson, Inc.***, 2006 WI App 5, ¶15, 288 Wis. 2d 680, 709 N.W.2d 901 (on remand the

[4] We commend the GAL and the circuit court for acting promptly following our summary reversal. Our reversal put the temporary order back in play which meant that the children were returned to primary placement with Kasee and then commuting to school. Resolution of the issue in a prompt manner was in the children's best interests.

circuit court has discretion to address matters as seems wise and proper under the circumstances as long as not inconsistent with the mandate), *review granted*, 2006 WI 23, 289 Wis. 2d 9, 712 N.W.2d 34 (No. 2004AP2655).

¶9 We turn to the principle issue on appeal—whether the modification of primary placement was a proper exercise of discretion. *See* ***Landwehr v. Landwehr***, 2006 WI 64, ¶7, 291 Wis. 2d 49, 715 N.W.2d 180. A discretionary decision is affirmed when the circuit court applies the correct legal standard to the facts of record and reaches a reasonable result. ***Keller v. Keller***, 2002 WI App 161, ¶6, 256 Wis. 2d 401, 647 N.W.2d 426. Modification is proper if it is in the best interests of the child and there has been a substantial change of circumstances. WIS. STAT. § 767.451(1)(b)1. There is a rebuttable presumption that continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the child's best interest. Sec. 767.451(1)(b)2.

¶10 Kasee first argues that because a parent with primary physical placement of a child may move at distance less than 150 miles without notice to the other parent, *see* WIS. STAT. § 767.481(1)(a), her move to Middleton, a distance of 125 miles, does not constitute a substantial change of circumstances. She points out that the move did not force a change in Robert's periods of placement.

¶11 The removal statute, WIS. STAT. § 767.481(1)(a), has no role in determining whether a substantial change of circumstances occurred. It is a notice statute related only to moves that trigger its operation. It does not preclude a move of a lesser distance from being a factor in determining whether a substantial change of circumstances occurred.

¶12 "Whether a 'substantial change of circumstances' has occurred is a legal question." ***Keller***, 256 Wis. 2d 401, ¶7. The parties initially lived in close proximity to one another. The circuit court found the placement arrangement worked well and each parent was accommodating to the other's schedule with respect to placement. It found that the move of 125 miles creates logistical problems which impacts the children's lives, most notably the frequent 250-mile roundtrip car ride. An additional change was that the children had started school and were doing well in their school. The court also found the move would remove the children from their friends, extended family with whom they enjoy a close relationship, security and routine. Kasee's move created a substantial change of circumstances.

¶13 The circuit court acknowledged the relevant factors under WIS. STAT. § 767.41(5)(am) bearing on a determination of the children's best interest. Kasee argues that the circuit court failed to consider a number of those factors. That the circuit court did not specifically address each statutory factor does not mean that it did not consider them. The circuit court found that both parents were even with respect to all factors save a few.

¶14 The decision to change placement was driven by the circuit court's determination that Robert would act to put the children's interests first and to promote Kasee's placement rights and relationship with the children. Specifically, the court found that Kasee had twice made decisions to move the children a great distance without consulting Robert and without thought to the impact the move would have on the children's relationship with their father. She disregarded the import Robert has in the children's lives. The court also found that primary placement with Kasee would isolate the children from their "home base" and relationships they have known all their lives. These findings are not clearly

erroneous and also support the determination that the presumption in favor of maintaining the status quo was overcome. Moreover, the determination did not, as Kasee contends, penalize Kasee for moving to a different city; it was a determination based on the impact on the children's relationship with their father and other family relationships.[5]

¶15 Kasee claims the circuit court ignored evidence of Robert's physical abuse of her during the marriage. The circuit court noted that the evidence presented by the parties on the "dark days" of the marriage was not helpful. Implicitly the circuit court found that the parties' past behavior had no impact on the placement arrangement, an arrangement that was working well and was not marked by any unpleasant incidents between the parties. At the October 25, 2006 hearing after this court's summary reversal, the circuit court made a finding that Robert had taken remedial action and sought counseling. That finding is based on evidence of record. The circuit court did not simply ignore the domestic abuse evidence.

¶16 Kasee argues that the GAL should have been removed and his report stricken.[6] She contends the GAL violated requirements in WIS. STAT. § 767.407(4) to advocate for the best interests of the children, act independently, consider the best interest factors, investigate possible inter-spousal abuse, and

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[5] ***Groh v. Groh***, 110 Wis. 2d 117, 327 N.W.2d 655 (1983), on which Kasee heavily relies in support of her contention that primary placement cannot be changed simply because she decided to move, has no application. In ***Groh*** there was no evidence that a change in custody to the father was in the children's best interest. ***Id.*** at 130.

[6] In reply to the GAL's brief in this appeal, Kasee contends the brief fails to comply with the rules of appellate procedure and should be ignored. Despite the shortcomings in the GAL's brief in failing to cite to the record or legal authority, it would serve no purpose to strike the brief. Robert's respondent's brief fully and adequately addresses the issues.

communicate the wishes of the children. The circuit court did not express its reasons for denying Kasee's more recent motion to remove the GAL and strike his report. We search the record for facts that support the discretionary determination. ***Rumpff v. Rumpff***, 2004 WI App 197, ¶19, 276 Wis. 2d 606, 688 N.W.2d 699.

¶17 First, the GAL's initial failure to communicate the wishes of the children was cured following our summary reversal and remand for that purpose. Second, evidence concerning domestic violence during the marriage was fully presented to the circuit court, more than the circuit court found necessary to hear. Investigation by the GAL would have served no purpose. Although the GAL interspersed his personal parenting views into his recommendations, it did not reach a point where the GAL was not advocating for the best interests of the children. It is nonsense to argue that it was wrong for the GAL to give his opinion rather than just bare facts. The GAL is charged with making a recommendation based on his observations. Kasee moved at a hearing on March 11, 2005, to block the reappointment of the GAL to serve on Robert's second motion for placement modification. The circuit court found that the GAL could serve fairly and impartially. Kasee's claim that the GAL should have been removed is nothing more than her dissatisfaction with the GAL's initial recommendation that opposed her move to Kansas City and questioned her credibility.

¶18 There is no need to address Kasee's argument that the temporary order prohibiting Kasee from removing the children from the Batavia school district was the result of an erroneous exercise of discretion. The temporary order is no longer in force and effect. We affirm the order modifying primary physical placement so the temporary order will not come into effect again. The issue is moot. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685,

608 N.W.2d 425 (an issue is moot when its resolution will have no practical effect on the underlying controversy; moot issues will not be considered on appeal).

¶19 The remaining issue is whether the requirement that Kasee pay child support of $323 per month for nine months and $200 per month for three months is the result of an erroneous exercise of discretion. *See* ***Zawistowski v. Zawistowski***, 2002 WI App 86, ¶7, 253 Wis. 2d 630, 644 N.W.2d 252 (the amount of child support is reviewed for an erroneous exercise of discretion). The circuit court rejected Kasee's contention that the shared placement formula should be used to calculate child support because she had overnight placement equivalent of 126 nights per year. *See* WIS. ADMIN. CODE § DWD 40.04(2)(a) (Dec. 2003) (the shared-placement formula may be applied when both parents have overnights or equivalent care placement of at least 25% or 92 days a year). Kasee contends that her placement with the children two weekdays during the school year from after school until 7:30 p.m. is the equivalent to overnight care.[7] Equivalent overnight care is time that is not overnight but requires the parent "to assume the basic support costs that are substantially equivalent to what the parent would spend to care for the child overnight." WIS. ADMIN. CODE § DWD 40.02(10) (Dec. 2003).

¶20 The circuit court found that Kasee had not demonstrated that she incurred the type of expenses equivalent to overnight expenses. Kasee does not cite evidence presented as to the costs incurred when exercising placement after school until 7:30 p.m. "The provision of an evening meal does not rise to the level

[7] Kasee has summer placement of approximately 38-42 overnights, placement during the remainder of year on alternating weekends of approximately 41 overnights, and 4.5 overnights for alternating holidays. The two weekday placements amount to 80 additional days of placement.

of equivalent care." ***Rumpff***, 276 Wis. 2d 606, ¶31. Application of the shared-placement formula was not required.

¶21 Kasee also argues that her child support should be reduced by the extraordinary travel expenses she incurs to exercise placement. *See* WIS. STAT. § 767.511(1m)(em) (one parent's extraordinary travel expenses is a factor the court may consider in determining whether application of the percentage standard for determining child support is unfair). The circuit court found that Kasee was incurring significant travel expenses; however, it concluded that she should bear the responsibility for those expenses since it was her choice to move such a distance away from the children. Kasee argues that the decision does nothing more than punish her for deciding to move.

¶22 "The party seeking a deviation from the established child support standards has the burden of proving that application of the standards in that case is unfair to the party or the child." ***Winkler v. Winkler***, 2005 WI App 100, ¶27, 282 Wis. 2d 746, 699 N.W.2d 652. Other than establishing the expense itself, Kasee did not make any other showing of why the child support order was unfair to her. Other than additional money out-of-pocket to Kasee, we wonder how the amount of child support is unfair to her. It was Kasee's decision to place herself in a position where extensive travel was required to exercise placement. As the circuit court observed, it is Kasee and not the children who should bear that expense. The child support order is not the product of an erroneous exercise of discretion.

By the Court.—Order affirmed.

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