COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP313-FT **Cir. Ct. No. 2002FA1280**

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

IN RE THE MARRIAGE OF:

DAVID ROBERT WEISS,

PETITIONER-APPELLANT,

V.

CONSTANCE ESTHER YAEGER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: SHELLEY J. GAYLORD, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. David Weiss appeals from an order modifying physical placement of his daughter, Susanna. We affirm.

¶2 Weiss and Constance Yaeger were divorced in 1999. Weiss filed a motion to change legal custody, physical placement, and support in March 2006. Some issues were resolved by a stipulation in May 2006, but questions regarding school-year placement were addressed in an evidentiary hearing in October 2006. The court decided the placement issues by order in November 2006, and after an amended order and order on reconsideration, Weiss appeals.

¶3 Weiss argues that the court failed to properly consider and apply WIS. STAT. § 767.41 (2005-06),[1] formerly WIS. STAT. § 767.24. He first argues that by changing Susanna's school-year placement with him from once every three weeks to a schedule where the gaps vary from two to five weeks, the court has violated the requirement to set a placement schedule that "allows the child to have regularly occurring" periods of physical placement. *See* § 767.41(4)(a)2. He cites no authority interpreting this statute as requiring mathematically precise regularity. Such an interpretation would be inconsistent with the broad discretion given to circuit courts in this area, and with the realities of the many scheduling demands of modern family life. We reject the argument.

¶4 Weiss argues that the chosen schedule fails to "maximize[] the amount of time the child may spend with each parent," as required by WIS. STAT. § 767.41(4)(a)2. He argues that it fails to do this because it reduces certain

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted. We recognize that the renumbering to WIS. STAT. § 767.41 was not effective until January 1, 2007, after the date of the order being appealed. *See* 2005 Wis. Act 443, § 267. This statute was amended by several acts during the 2005-06 session, some of which were effective before the order on appeal, and one after. However, the parties have not informed us that any of these amendments are material to the issues on appeal, and therefore we will use the statute text and numbering as they appear in the 2005-06 official edition of the statutes, incorporating all the changes from that session.

periods of time with him without increasing others, and for other reasons. However, he cites no authority holding that the "maximize[]" statutory language creates an independent and enforceable factor in placement decisions. To the contrary, the supreme court has described this language as "a general directive," ***Landwehr v. Landwehr***, 2006 WI 64, ¶18, 291 Wis. 2d 49, 715 N.W.2d 180, and stated: "The term 'maximize' does not supersede the trial court's discretion to construct a schedule it determines is in the best interest of the child and otherwise in conformity with the intricate dictates of § 767.24." ***Id.***, ¶20.

¶5 Weiss argues that the court gave selective weight to certain opinions by Susanna's counselor, but not others. However, Weiss has cited no authority that would prevent the court from making precisely these kinds of choices in the course of exercising its discretion to determine the best interest of the child.

¶6 Weiss argues that the court failed to give adequate consideration to some of the factors set forth in WIS. STAT. § 767.41(5), such as the wishes of the parties, the wishes of the child, the child's interaction and interrelationship with others, and the need for predictability and stability. We disagree. The court's decisions demonstrate sufficient consideration of the required statutory factors.

¶7 Weiss argues that it was improper for the court to have reduced his total placement time, when the only motion pending before the court was his motion to *increase* his placement time. He relies solely on ***State v. Lucas***, 2006 WI App 112, 293 Wis. 2d 781, 718 N.W.2d 184. In that case, the circuit court changed custody from joint to sole, even though no party had requested a change of custody. We reversed on the ground that the court lacked authority to address custody *sua sponte*. ***Id.***, ¶31. ***Lucas*** does not apply to the present case because its discussion was narrowly focused on that particular circumstance, which does not

exist here. In this case, Weiss, by moving for modification of physical placement, opened the door to have the court consider all the facts and circumstances surrounding Susanna's placement, and to determine what was in her best interest.

By the Court.—Order affirmed.

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