

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2007AP1529-FT

Cir. Ct. No. 2005FA62

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

KELLY M. HEIDENREICH, P/K/A KELLY M. MARQUARDT,

PETITIONER-APPELLANT,

V.

TIMOTHY J. MARQUARDT,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Forest County: ROBERT A. KENNEDY, JR., Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM.¹ Kelly Heidenreich appeals a judgment and order awarding her ex-husband, Timothy Marquardt, joint legal custody and shared physical placement of their child, Ely. Kelly contends the circuit court erred by failing to apply provisions of WIS. STAT. § 767.41 relating to domestic abuse. We reverse the judgment and order of the circuit court and remand with the directions specified below.

BACKGROUND

¶2 The issues in Kelly and Timothy's divorce were bifurcated. The property division was resolved in a divorce judgment dated October 6, 2006. Later, custody and placement issues regarding their minor child, Ely, were addressed in a judgment and order dated April 9, 2007. Kelly appeals from the latter judgment and order.

¶3 At the custody and placement hearing, Kelly sought sole legal custody and primary physical placement of Ely, relying on provisions of WIS. STAT. § 767.41 relating to domestic abuse. Timothy was convicted of domestic battery for an incident occurring in October 2005. He was using alcohol and drugs at the time, and both Kelly and Ely were injured in the incident. The circuit court rejected Kelly's arguments and ordered joint legal custody and shared physical placement.

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.

DISCUSSION

¶4 Custody and placement decisions are discretionary determinations of the circuit court. *Koeller v. Koeller*, 195 Wis. 2d 660, 663-64, 536 N.W.2d 216 (Ct. App. 1995). We will affirm a court's discretionary determination if the court examined the relevant facts, applied the appropriate law, and used a demonstrated reasoning process to reach a conclusion a reasonable judge could reach. *Martin L. v. Julie R.L.*, 2007 WI App 37, ¶4, 299 Wis. 2d 768, 731 N.W.2d 288. Whether a party has met a required burden of proof is a question of law we review without deference. *Brandt v. Brandt*, 145 Wis. 2d 394, 409, 427 N.W.2d 126 (Ct. App. 1988).

¶5 Kelly argues the circuit court wholly failed to engage in an analysis of the relevant domestic violence provisions of WIS. STAT. § 767.41. Specifically, she contends: the court failed to make her and Ely's safety its paramount concern in its custody and placement decision, as required by § 767.41(5)(bm); and the court erred by finding that Timothy rebutted the presumption against awarding him joint or sole legal custody, pursuant to § 767.41(2)(d)1. Timothy contends the court conducted the appropriate analyses, though he concedes the court's ruling lacked clarity.

¶6 We cannot conclude, based on the record, that the court considered the relevant facts or applied the appropriate law. Therefore, the court erroneously exercised its discretion, and the judgment and order must be reversed.

¶7 We first address WIS. STAT. § 767.41(2)(d)1, which relates to legal custody, and states:

Except as provided in subd. 4., if the court finds by a preponderance of the evidence that a party has engaged in a

pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), pars. (am), (b), and (c) do not apply and there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party. The presumption under this subdivision may be rebutted only by a preponderance of evidence of all of the following:

a. The party who committed the battery or abuse has successfully completed treatment for batterers provided through a certified treatment program or by a certified treatment provider and is not abusing alcohol or any other drug.

b. It is in the best interest of the child for the party who committed the battery or abuse to be awarded joint or sole legal custody based on a consideration of the factors under sub. (5) (am).

Timothy concedes that a serious incident of interspousal battery occurred. Therefore, the statutory presumption against awarding him joint or sole legal custody applied. To rebut this presumption, Timothy had the burden of proving, among other things, that he completed treatment for batterers and was not abusing alcohol or other drugs.

¶8 Kelly focuses her arguments upon whether Timothy met his burden of proving that he was not abusing alcohol or other drugs.² The only affirmative evidence relied upon by Timothy regarding his alcohol and drug use is that he was required to refrain from alcohol use as a condition of probation and that his term of probation was completed without being revoked. In Timothy's testimony on direct examination, he did not attempt to explain the scope of his current alcohol

² Kelly does not argue that Timothy failed to complete treatment for batterers, instead focusing on the alcohol issue. We nevertheless note that no evidence was presented that Timothy completed a treatment program meeting the requirements of WIS. STAT. § 761.41(2)(d)1.

and drug use. On adverse examination, when asked how many of the previous thirty days he consumed alcohol, Timothy only stated that he did not drink on days when he had Ely. He did not state whether, and how many times, he became intoxicated when he did drink. He also admitted that, on the weekend preceding the hearing, he lost control of his vehicle and abandoned it in a ditch after a night of drinking.

¶9 The fact that Timothy's probation was not revoked was insufficient, by itself, to prove that he was not abusing alcohol or other drugs. Even if one could argue this fact constitutes credible evidence supporting a finding that Timothy was not abusing alcohol during probation, it gives no indication of Timothy's alcohol or drug use following his probation term.

¶10 The court did not engage in any coherent discussion of Timothy's alcohol or drug use, nor did it explain what evidence regarding Timothy's alcohol and drug use resulted in the statutory presumption being rebutted. In this regard, the court erroneously exercised its discretion. Beyond that, we conclude there was insufficient evidence presented to satisfy Timothy's burden of proof. Therefore, on remand, we direct the circuit court to grant sole legal custody of Ely to Kelly.

¶11 Kelly's second argument relies upon WIS. STAT. § 767.41(5)(bm), which states:

If the court finds under sub. (2) (d) that a parent has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the safety and well-being of the child and the safety of the parent who was the victim of the battery or abuse shall be the paramount concerns in determining legal custody and periods of physical placement.

Again, it is undisputed that a serious incident of domestic violence occurred, so this provision applies. And while the statute applies to decisions regarding custody and placement, Timothy is not a candidate for legal custody pursuant to the discussion above. Therefore, we address § 767.41(5)(bm) in the context of physical placement only.

¶12 From the record, it is not clear the circuit court considered the safety and well-being of Ely, or the safety of Kelly, in making its placement decision. In the underlying domestic violence incident, both Kelly and Ely were injured. Yet the court did not engage in any meaningful consideration of the incident or how its placement decision would minimize the risk of future danger. Instead, throughout its ruling, the court seemed to de-emphasize the incident. When addressing the custody issue, the court stated: “So I mean I, I would say that because one person wanted a divorce and that created the back lash so to speak, at least in part I think you can overcome a presumption over joint legal custody.”³ In the context of physical placement, the court reasoned:

Probably because there is a period of time between all of this happening. And Mr. Marquardt has been on probation. And it has not been revoked. And I think because of the lapse of time that still would be assumed to be shared. In other words, I don't think that I can say that the things that happened in 2005 prior problems are in full force and effect today because he has had probation. And I think that you're kind of basically looking at a shared situation.

³ The court's de-emphasis of the domestic battery is particularly concerning given Timothy's nonchalant attitude toward the battery at the custody and placement hearing, where he stated, “I cuffed her upside the head, you know, like an attention getting, like, ‘Hey, you stupid bitch you ruined all three of our lives. What in the hell did you file divorce for?’ And it makes no sense to me.”

Then, instead of considering the domestic violence in the context of Ely's and Kelly's safety, the court simply used Kelly's argument to award her extra periods of placement. In the context of Kelly's vacation time, the court stated, "I will give her the whole six [weeks] because [Kelly's attorney] does have some arguments. And [Kelly's attorney] kind of has to have the score evened up a little bit."

¶13 The evident purpose of WIS. STAT. § 767.41(5)(bm) is to ensure that the courts' custody and placement decisions are made with conscious regard for the safety and well-being of the child and the safety of the parent who was the victim of domestic violence. Here, the court's use of Kelly's argument to award an extra six weeks of placement has no apparent connection to the safety of Ely or Kelly. The same is true of the court's placement ruling generally. The court's failure to make the safety and well-being of Ely, along with the safety of Kelly, its paramount concern constituted an erroneous exercise of discretion. On remand, we direct the court to reconsider its placement decision, demonstrating on the record that its paramount concern is Ely's safety and well-being and Kelly's safety.

By the Court.—Judgment and order reversed and cause remanded with directions.

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

