COURT OF APPEALS
DECISION
DATED AND FILED

July 10, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1839 **Cir. Ct. No. 1998FA782**

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

IN RE THE MARRIAGE OF:

RHONDA BIRD,

PETITIONER-RESPONDENT,

V.

DALE BIRD,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Dale Bird appeals a post-divorce order that modified the physical placement schedule for the parties' children. We affirm for the reasons discussed below.

BACKGROUND

¶2 Dale and Rhonda Bird were divorced in 2000. The court initially awarded primary physical placement of the parties' two preschool boys to Rhonda pursuant to a partial marital settlement agreement.

¶3 Rhonda asked Dale and his new wife Susan to assume primary placement in 2003, so that she could obtain additional education without putting the children in daycare. The court transferred primary placement to Dale based on the parties' stipulation. At the time of the transfer, Dale was working nights while Susan was working for the Girl Scouts in the evenings. Dale and Susan's schedules changed several times over the following years, and they relied upon family members to assist with childcare when they were both at work.

¶4 Rhonda moved to modify the placement schedule again in 2006. Following an evidentiary hearing, the court made factual findings that Rhonda had obtained a flexible job working only twenty-eight hours a week after completing her education, and, except for two nights per month, was available to pick the children up from school and spend the evenings with them. The court concluded that Rhonda's availability "to be a full-time care provider" for the boys—while they would be primarily watched by Susan or other relatives on weekdays at Dale's house—constituted a substantial change in circumstances. It further determined that maximizing the time spent with a parent was in the children's best interest, as well as in accordance with the most recently expressed wishes of the children to reside with their mother. The court ultimately decided to transfer primary physical placement of the children to Rhonda during the school year, and to Dale during the summer.

DISCUSSION

¶5 After more than two years have passed since a final divorce judgment, a court may substantially modify a physical placement schedule when there has been a substantial change in circumstances since the last order and the modification would be in the best interest of the child. WIS. STAT. § 767.451(1)(b)1 (2005-06).[1] There is, however, a rebuttable presumption that continuing primary placement with the parent with whom the child currently resides is in the child's best interest, and a mere change in the economic circumstances or marital status of either parent is insufficient to qualify as a substantial change of circumstances. Section 767.451(1)(b)2. In setting a modified schedule, the court shall consider the same factors under WIS. STAT. § 767.41(5) that apply in initial placement decisions.[2] Section 767.451(5m). It

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

[2] WISCONSIN STAT. § 767.41(5)(am) provides:

[I]n determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian.… [T]he court shall consider the following factors in making its determination:

1. The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.

2. The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.

3. The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.

4. The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.

(continued)

should also set forth the reasons for its decision in writing if either party opposes the modification. Section 767.451(5).

---

5. The child's adjustment to the home, school, religion and community.

6. The age of the child and the child's developmental and educational needs at different ages.

7. Whether the mental and physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.

8. The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.

9. The availability of public or private child care services.

10. The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.

11. Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.

12. Whether there is evidence that a party engaged in abuse, as defined in s. 813.122(1)(a), of the child, as defined in s. 48.02(2).

12m. Whether any of the following has a criminal record and whether there is evidence that any of the following has engaged in abuse, as defined in s. 813.122(1)(a), of the child or any other child or neglected the child or any other child:

a. A person with whom a parent of the child has a dating relationship, as defined in s. 813.12(1)(ag).

b. A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.

13. Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20(1m) or domestic abuse as defined in s. 813.12(1)(am).

14. Whether either party has or had a significant problem with alcohol or drug abuse.

15. The reports of appropriate professionals if admitted into evidence.

16. Such other factors as the court may in each individual case determine to be relevant.

¶6 Modification decisions lie within the circuit court's discretion, and will be upheld so long as the court applied the correct legal standard to reach a reasonable result. ***Landwehr v. Landwehr***, 2006 WI 64, ¶7, 291 Wis. 2d 49, 715 N.W.2d 180. However, whether the trial court has applied the correct legal standard is a question of law that we review de novo. ***Id.***, ¶8.

¶7 Dale first challenges the trial court's factual finding that Rhonda could be a "full-time care provider" for the children, since she was employed outside of the home. We are not persuaded that employment outside the home prevents a parent from providing full-time childcare to school-age children, however, as opposed perhaps to being a full-time homemaker. The court's finding that Rhonda could provide full-time care was directly supported by her testimony about the flexibility of her work schedule. That is, unlike Dale, she would not need to rely on third parties to provide care for the children after school, other than two nights a month.

¶8 Dale next argues that Rhonda's increased availability to care for the children did not constitute a substantial change in circumstances as a matter of law. He relies in part upon ***Landwehr***. In that case, however, the Wisconsin Supreme Court *upheld* a trial court's determination that a father's increased availability to spend time with his children constituted a substantial change in circumstances.[3] ***Landwehr***, 291 Wis. 2d 49, ¶¶14, 31, 34. We are similarly satisfied that Rhonda's increased availability constituted a substantial change in

[3] Dale's confusion apparently results from the fact that the trial court in that case went on to conclude that it was still in the children's best interest to continue primary placement with their mother during the school year. That decision, however, goes to the second step in the modification analysis—the consideration of the fourteen statutory factors.

circumstances here—particularly given that the prior transfer of placement from Rhonda to Dale was predicated upon Rhonda's anticipated lack of time to spend with the children while she attended college.

¶9 Dale next argues that the trial court erroneously exercised its discretion by failing to address the best interest factors in WIS. STAT. § 767.41(5)(am) and failing to apply the rebuttable presumption that continuing the status quo would be in the children's best interests. It is true that the trial court did not explicitly go through the statutory factors point by point. However, it cited the correct statutes at the beginning of its bench ruling and incorporated relevant factors into its discussion. For instance, it acknowledged the children's most recently expressed wish to live with their mother; Susan's beneficial influence on the children's academic progress; and the fact that both children were extremely well adjusted. Looking at the court's discussion as a whole, it is apparent that it was well aware of the presumption that continuing placement would be in the children's best interest, but was convinced that Rhonda's availability to spend the evenings with the children while Dale was working evenings was the prevailing factor overcoming the presumption. We are satisfied that was a reasonable exercise of discretion.

¶10 Finally, Dale complains that the trial court failed to set forth the reasons for its decision in writing. Again, however, ***Landwehr*** controls. The court there found it was acceptable, if not ideal, for the trial court to incorporate the oral reasons given for its decision into its written order by reference. ***Id.***, ¶34. That is what the court's amended order did here.

By the Court.—Order affirmed.

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