COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1023 **Cir. Ct. No. 99-FA-67**

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

IN RE THE MARRIAGE OF:

MELANIE GUTH,

PETITIONER-APPELLANT,

V.

TIMOTHY GUTH,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Forest County: ROBERT A. KENNEDY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Melanie Guth appeals an order denying her request for costs and actual attorney fees in this custody and placement dispute. Melanie argues that she is entitled to costs and fees under WIS. STAT. § 804.12(3) as a

matter of law because her former husband, Timothy Guth, refused to admit her demand for admission concerning placement of the parties' children. We reject her argument and affirm the order.

¶2 In 1999, Melanie filed a petition for divorce seeking legal custody and primary physical placement of the parties' two daughters, ages four and six. She also requested that the children be allowed liberal periods of physical placement with Timothy. During the course of discovery, Melanie served upon Timothy a series of "demands to admit or deny." In May 2000, Timothy answered them as follows:

> 1. That respondent, Timothy Guth, shall not be awarded primary physical placement of the minor children of the parties, to-wit: [J.G.] and [H.G.].
>
> ANSWER: Denies that Tim Guth shall not be awarded primary physical placement of the minor children of the parties. Tim Guth has no way of knowing how the court will ultimately rule on placement. Tim Guth affirmatively alleges that it is in the minor children's best interest that he be awarded primary physical placement of the children subject to the periods of physical placement with their mother.
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> 2. That the respondent, Timothy Guth, shall not be entitled to equal placement of the minor children of the parties, to-wit: [J.G.] and [H.G.].
>
> ANSWER: Denies that Tim Guth shall not be entitled to at least equal placement of the minor children of the parties. See answer to number 1.
>
> 3. That Petitioner, Melanie Guth, shall be entitled to primary placement of the minor children of the parties, to-wit: [J.G.] and [H.G.].
>
> ANSWER: Denies that Melanie Guth shall be entitled to primary placement of the minor children of the parties. See answer to number 1.

> 4. That Petitioner, Melanie Guth, shall be entitled to joint placement of the minor children of the parties, to-wit: [J.G.] and [H.G.].
>
> ANSWER: Denies that Melanie Guth shall be entitled to joint placement of the minor children of the parties.

¶3 In August 2000, the children's guardian ad litem filed a document entitled, "Preliminary Recommendation of Guardian ad Litem." It recommended joint legal custody and shared physical placement, alternating on a weekly basis.

¶4 At the trial, Timothy testified that he sought primary placement because he objected to the immoral environment Melanie and her live-in boyfriend created. He believed the boyfriend was not an appropriate role model due to his criminal record and alcohol problems.[1] Timothy was also concerned that Melanie's lifestyle would be transferred to the parties' daughters. He was surprised when one of their daughters stated that when she grew up, she wanted to have a boyfriend in addition to a husband, "just like mom." He agreed that Melanie was a fit parent, but objected to the lifestyle choices she made.

¶5 On November 7, the trial court entered a judgment of divorce, finding that both parties were fit to have joint legal custody. In addition, the court found that it was in the children's best interests to award shared equal placement. Although the guardian ad litem recommended placement alternating each week, the court ordered an alternating two-week schedule. No child support order was entered at that time.

[1] The record indicates that Melanie's boyfriend was required to take a portable breath test before visiting his own child.

¶6 On November 30, the trial court held a hearing regarding child support and attorney fees. Melanie moved the court for an order requiring Timothy to pay $6,579.20 in costs and attorney fees that she incurred as a result of trying the custody and placement dispute. She argued that Timothy should be held responsible for the fees because he refused to agree to equal shared placement in her "Demands for Admission." The trial court denied her motion.

¶7 Melanie argues that she is entitled to costs and attorney fees under WIS. STAT. § 804.12(3) because Timothy failed to admit the truth of her request for an admission.[2] Melanie's argument rests upon faulty statutory interpretation. Because this issue is resolved by resort to statutory language, it presents a question of law we decide without deference to the trial court, while benefiting from its analysis. *See* ***State v. Setagord***, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997). We first look to the language of the statute itself. ***Id.*** If the meaning of the statute is clear on its face, we apply it as written. *See* ***id.***

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[2] WISCONSIN STAT. § 804.12(3) provides:

> **(3)** EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the genuineness of any document or the truth of any matter as requested under s. 804.11, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in the making of that proof, including reasonable attorney fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to sub. (1), or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (d) there was other good reason for the failure to admit.

All statutory references are to the 1999-2000 version unless indicated otherwise.

¶8 A request for admission is one of the discovery methods provided in WIS. STAT. § 804.01. Parties may obtain discovery regarding any unprivileged matter relevant to the pending action. WIS. STAT. § 804.01(2). The procedure for requests for admission is described in WIS. STAT. § 804.11(1)(a):

> [A] party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of s. 804.01(2) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.

Accordingly, under the plain language of § 804.11(1)(a), a request for admission must "relate to statements or opinions of fact or of the application of law to fact."

¶9 Melanie offers no authority for her implicit premise that the issue of child custody and placement in a divorce constitute issues of fact or the application of law to fact. It is widely accepted that the issue of child custody and placement is addressed to trial court discretion. *See* ***Koeller v. Koeller***, 195 Wis. 2d 660, 663, 536 N.W.2d 216 (Ct. App. 1995). Because WIS. STAT. § 804.11(1)(a) makes no mention of requests to admit a prediction of a court's discretionary exercise, we are unpersuaded that it applies to the questions Melanie posed.

¶10 In any event, Timothy provided reasonable ground to believe that he may be awarded primary placement. Under WIS. STAT. § 804.12(3), no costs or attorney fees are awarded when a party refuses to admit a matter requested if "the party failing to admit had reasonable ground to believe that he or she might prevail on the matter." Timothy testified that he sought primary placement because he objected to the moral atmosphere Melanie presented when she invited her boyfriend, who has a criminal record and is battling an alcohol problem, to move

in with her and the children. He feared their daughters' moral choices would be adversely affected, because one mentioned that when she grew up, she would like to have a husband and a boyfriend on the side, "like mom." We are satisfied that Timothy provided a "reasonable ground to believe that [he] might prevail" on the issue of primary placement. *See* WIS. STAT. § 804.12(3).

¶11 Melanie argues that Timothy's belief was not reasonable because it was contrary to the guardian ad litem's recommendation and was based on non-relevant factors. We disagree. The guardian ad litem's recommendation is not binding on the court. ***In re Schmidt***, 71 Wis. 2d 317, 328, 237 N.W.2d 919 (1976). Indeed, the guardian ad litem's report was only a preliminary recommendation.

¶12 Also, the factors Timothy raised were relevant to the court's determination. Relevant factors for the court to consider in deciding placement include the father's wishes, the interaction of the child with persons who significantly affect the child's best interests, and the mental health of individuals living with the child. WIS. STAT. § 767.24(5). In addition, evidence of immoral conduct or extramarital affairs may be considered when there is evidence of a connection between the immoral conduct and some demonstrable harmful effect on the children. *See* ***Gould v. Gould***, 116 Wis. 2d 493, 502-03, 342 N.W.2d 426 (1984).[3] Because Timothy's position was grounded both in law and fact, the trial court was entitled to conclude that Timothy advanced a reasonable basis for his refusal to admit Melanie's request.

[3] "As Justice Hanley said in ***Goembel v. Goembel***, 60 Wis. 2d 130, 140, 208 N.W.2d 416 (1973), where the custodial parent engages in illicit relationships, 'the importance of showing adverse effects has been emphasized by this court on several occasions.'" ***Gould v. Gould***, 116 Wis. 2d 493, 502-03, 342 N.W.2d 426 (1984).

¶13 Melanie further argues that the trial court erred procedurally when it denied her costs and fees because Timothy failed to file documents objecting to her motion. She claims that she is entitled to summary judgment on her motion because it was unrefuted. We disagree. Even if the trial court were to treat her motion as one for summary judgment, Melanie would not prevail because she failed to demonstrate a prima facie case for relief. *See* ***Walter Kassuba, Inc. v. Bauch***, 38 Wis. 2d 648, 655-56, 158 N.W.2d 387 (1968). As a result, counter-affidavits are not necessary.

By the Court.—Order affirmed.

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