COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1260 **Cir. Ct. No. 2006FA200**

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

IN RE THE SUPPORT OF BRYANNA TIPPERREITER:

KARIE S. ANDERSON,

PETITIONER-APPELLANT,

V.

EDWARD J. TIPPERREITER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: JOHN S. JUDE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Karie S. Anderson has appealed from an order awarding custody and physical placement of her daughter, Bryanna, the non-marital child of Anderson and the respondent, Edward J. Tipperreiter. The order

awarded joint legal custody to Anderson and Tipperreiter, who reside in Wisconsin and Florida, respectively. It awarded primary physical placement to Tipperreiter, with secondary physical placement to Anderson. It established one placement schedule for the period up to August 23, 2009, and a different schedule after that date. Beginning September 1, 2009, Anderson was also required to begin paying child support of $140 per month. We affirm the order.

¶2 Bryanna was born on January 15, 2005. A voluntary acknowledgement of paternity was filed at the time of her birth. The parties lived together off and on during the period before and after Bryanna's birth.

¶3 In February 2006, Anderson petitioned for sole custody and primary physical placement of Bryanna. In May 2006, Tipperreiter filed a counter-petition for sole custody and primary physical placement. In May 2006, the parties also stipulated that Anderson would be granted sole temporary custody and primary physical placement of Bryanna, but that if Anderson was sentenced to a term of incarceration based on criminal proceedings pending against her in federal court, Tipperreiter would be granted temporary sole custody and primary physical placement of Bryanna, and would be permitted to remove her to Ohio, where he was then living.

¶4 In late July 2006, Anderson was sentenced to four months in prison and five years of supervision for bank fraud. On July 28, 2006, the day after Anderson's sentencing, a hearing was held before a court commissioner. In an order granted on July 28, 2006 and entered on September 1, 2006, the court commissioner awarded joint legal custody to the parties, and awarded primary physical placement to Tipperreiter. The order provided for Bryanna's transfer to Tipperreiter on July 29, 2006, and granted him permission to relocate her to Ohio.

¶5 On September 18, 2006, after Anderson's incarceration, Tipperreiter filed a notice of intent to move with Bryanna to Florida, where his parents live. No response in opposition was filed by Anderson, and Tipperreiter moved to Florida in late 2006, residing first with his parents and subsequently in a two-bedroom apartment with Bryanna, near his parents and sister. Tipperreiter, who is an FAA licensed flight dispatcher, also obtained employment in Florida.

¶6 After Anderson's release from prison, the parties alternated placement of Bryanna every three weeks pending trial of custody and placement. Trial was subsequently held in the circuit court over the course of four-and-a-half days. In a written decision and order incorporating previous oral findings of fact and conclusions of law, the trial court awarded the parties joint legal custody of Bryanna, and awarded primary physical placement to Tipperreiter. It awarded specific periods of physical placement to Anderson for the period up until August 23, 2009, and awarded different periods of placement for the period after August 23, 2009. Periods of placement after August 23, 2009, were structured around a school year calendar, affording Anderson placement at Christmas break, spring break, some holidays, nearly the entire summer break, and one additional vacation week. Commencing September 1, 2009, Anderson was also required to pay $140 per month in child support based on 109 overnights per year.

¶7 A trial court has wide discretion in making a physical placement decision. ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992). An exercise of discretion will not be upset unless it represents an erroneous exercise of discretion or the trial court misapplied the law. ***Id.*** This court will affirm the trial court's discretionary determination if it applied the correct legal standard to the facts of record and reached a reasonable result. ***Keller v. Keller***, 2002 WI App 161, ¶6, 256 Wis. 2d 401, 647 N.W.2d 426. However, a

trial court erroneously exercises its discretion when it bases its determination upon an error of law. ***Koeller v. Koeller***, 195 Wis. 2d 660, 664, 536 N.W.2d 216 (Ct. App. 1995).

¶8 As a reviewing court, we search the record for reasons to sustain the trial court's exercise of discretion. ***Keller***, 256 Wis. 2d 401, ¶6. The credibility of the witnesses and the weight of their testimony is determined by the trial court, which has a superior opportunity to observe the demeanor of the witnesses and gauge the persuasiveness of their testimony. ***Patrickus v. Patrickus***, 2000 WI App 255, ¶26, 239 Wis. 2d 340, 620 N.W.2d 205. We search the record for evidence to support the findings made by the trial court, not for evidence to support findings that the trial court could have, but did not, make. ***Id.*** The trial court's findings of fact will be disturbed only if they are clearly erroneous. ***Wiederholt***, 169 Wis. 2d at 531.

¶9 Anderson contends that the trial court committed legal error by entering an order prospectively reducing her placement time beginning in the fall of 2009. She also contends that the trial court erroneously exercised its discretion by awarding primary physical placement to Tipperreiter, contending that it failed to appropriately consider the factors set forth in WIS. STAT. § 767.41(4)(a)2. and (5) (2007-08),[1] and made findings that were contrary to the record. She also contends that the trial court erred by prospectively modifying child support. We reject all of Anderson's arguments.

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

¶10 Anderson's first argument is that the trial court erred by entering an order which reduced her placement time beginning in the fall of 2009. She contends that by doing so, the trial court made an award that violated the prohibition on prospective and contingent custody or placement awards set forth in ***Koeller***, 195 Wis. 2d at 665-67. She contends that placement decisions must be based upon historical information and present facts, not conjecture, predictions, or contingencies. She contends that because Bryanna was not yet school age when the trial court made its decision, and would not be legally required to attend school in the fall of 2009, the trial court's decision as to placement after August 23, 2009 was premised on prospective, unknown events.

¶11 We do not agree that the trial court's placement decision violates the prohibition on contingent, prospective awards. In ***Koeller***, a mother who was suffering from terminal cancer and whose ex-spouse suffered from mental illness moved the trial court to revise a divorce judgment to grant custody to her sister in the event of her incapacity or death. ***Id.*** at 661. The trial court granted the prospective custody award. ***Id.*** at 661-62. This court reversed the trial court's order, concluding that custody determinations must be based upon the trial court's assessment of historical and present factors related to the child's well-being and best interest. ***Id.*** at 667. We concluded that the law does not authorize a future change in custody based on circumstances that might not exist when the order is to take effect. ***Id.*** at 668.

¶12 In contrast to the situation in ***Koeller***, the trial court's placement decision was not contingent on any future event, including enrollment in school. While the trial court stated that it "anticipated" that Bryanna would be attending school on a full or part-time basis in the fall of 2009, it expressly declined to make its placement decision contingent on school enrollment.

¶13 Rather than being a contingent placement award, the trial court's decision reflected its recognition that in the fall of 2009 Bryanna would be close to five years old, and that this is an appropriate age for a child to attend a kindergarten or pre-kindergarten type of school program.[2] It also reflected the fact that primary placement was being awarded to Tipperreiter, who resides in Florida. By establishing a placement schedule constructed around the standard school year, the trial court was establishing a placement schedule appropriate for Bryanna's age, which would enable Tipperreiter to place her in a kindergarten or pre-kindergarten program in Florida. However, the placement order did not mandate school enrollment, and was not contingent upon such enrollment. Instead, the trial court's placement decision recognized the existing circumstances of Bryanna's life, including the fact that she was approaching school age, and established a schedule appropriate for that age.

¶14 Anderson's next argument is that the trial court erroneously exercised its discretion by failing to appropriately consider the factors set forth in WIS. STAT. § 767.41(4)(a)2. and (5) and by making findings that are contrary to the greater weight of the credible evidence. She contends that, based on the evidence, primary physical placement must be awarded to her.[3]

[2] In fact, testimony at trial indicated that Bryanna was already attending a daycare program with a school component.

[3] As discussed by the parties, the trial court initially viewed the order entered by the court commissioner on September 1, 2006 as a final order, and reviewed Anderson's petition for primary physical placement under WIS. STAT. § 767.451(1)(a), the standard applicable to a motion to modify placement made within two years of a final judgment. However, it subsequently reconsidered and evaluated the petition as one for an initial determination of placement under WIS. STAT. § 767.41(4)(a)2 and (5). No basis therefore exists to conclude that the trial court relied upon the wrong legal standard in evaluating the parties' petitions.

¶15 Contrary to Anderson's argument, we conclude that the trial court provided a detailed, thorough, and meaningful discussion of the factors relevant to its placement decision. Its findings of fact are not clearly erroneous and, based upon its findings, it could reasonably conclude that awarding primary physical placement to Tipperreiter was in the best interest of Bryanna. Because its decision is reasonable and based upon facts of record, we conclude that it properly exercised its discretion in making its placement decision.

¶16 In allocating periods of physical placement, a trial court is required to set a schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households. WIS. STAT. § 767.41(4)(a)2. As provided in WIS. STAT. § 767.41(5), it is required to consider all facts relevant to the best interest of the child and the factors delineated in § 767.41(5).

¶17 The trial court fully complied with its statutory responsibilities. It considered the wishes of the parents and the amount and quality of the time spent by each party with Bryanna in the past, noting that Anderson wanted to be restored to the custodial position she enjoyed before her incarceration, but that Tipperreiter had stepped forward and assumed that responsibility when she was incarcerated. It found that Tipperreiter had acted out of a sincere concern for Bryanna's well-being and had consistently fulfilled his commitment to Bryanna since that time,

findings that are supported by evidence in the record.[4] It further found that Tipperreiter's move to Florida was reasonable, enabling him to seek employment and obtain the assistance of his parents in raising Bryanna.

¶18 The trial court found that Bryanna was well-adjusted and healthy, that she was comfortable with both parents, and that both parents had taken good care of Bryanna and had the capacity to meet her needs. It considered that Bryanna had a particularly close relationship with Anderson's mother, but that her relationships with her paternal grandparents was also significant.

¶19 In evaluating the parties' relationship with each other and Bryanna, the trial court found that Bryanna previously had been subjected to a fractious relationship between Anderson and Tipperreiter. However, it found that both of the parties had made changes and had settled into a relatively stable lifestyle for Bryanna. Nevertheless, it also found credible concerns expressed by the guardian ad litem and court-appointed custody evaluator about Anderson's veracity and the impact of her decision to move in with a boyfriend shortly after her release from prison. Evidence indicated that she had failed to disclose her living arrangements, and that the boyfriend with whom she was living had a criminal record that included, among other things, a drug conviction, convictions for disorderly

[4] Anderson contends that in weighing the amount and quality of time each party spent with Bryanna in the past, the trial court failed to give appropriate weight to the fact that the crime for which she was sentenced was committed before she was pregnant with Bryanna, and that she was Bryanna's primary caretaker before incarceration. However, the weight to be given to this evidence was for the trial court to decide. While acknowledging Anderson's contributions, the trial court chose to credit Tipperreiter with "stepping up" and becoming a good father when Anderson went to prison. In addition, it was entitled to view Anderson's criminal history as negatively impacting on her credibility.

conduct and receiving stolen property, and multiple convictions for driving while intoxicated.

¶20 The trial court expressly acknowledged the goal of maximizing periods of placement with each parent, but also recognized the challenges posed by the geographical distance between the parties' residences. It recognized that Anderson's mother was available to provide day care in Wisconsin and that Bryanna had an important relationship with her, but found that Tipperreiter had also provided Bryanna with appropriate care in Florida, where she attended a program that was a combination of day care and preschool. It also noted that because Bryanna was growing older, the socialization that comes with attending school or day care with peers becomes a more important factor.[5]

¶21 The trial court also considered the evidence and argument concerning the parties' communication with each other and support for each other's relationship with Bryanna. It acknowledged that communication had been poor and divisive in the past. While indicating that it had concerns about Anderson's veracity, it also expressed concern with Tipperreiter's past tendency to demean and control Anderson, as evidenced by phone messages introduced at trial. However, the trial court concluded that the placement schedule established

[5] Anderson contends that Tipperreiter sends Bryanna to day care too frequently and wakes her too early for it, both by choice and because of his work schedule. She also objects that he placed Bryanna with his family too frequently. She contends that she is better able to provide for Bryanna's needs because Bryanna could stay home with her or with Anderson's mother. However, nothing in WIS. STAT. § 767.41(5) compelled the trial court to conclude that the arrangement proffered by Anderson was better than the child care arrangements of Tipperreiter, or to conclude that, viewing all factors, it was in Bryanna's best interest to be placed primarily with Anderson.

by it would limit their personal interaction, and reasonably concluded that this could enable them to communicate more positively with each other in the future.

¶22 The trial court also considered Anderson's testimony that Tipperreiter had engaged in domestic abuse as defined in WIS. STAT. § 813.12(1)(am)6. by holding a pizza cutter to her throat during an argument in January 2006. The parties discuss the evidence regarding this incident at length in their briefs. However, a review of the trial court's decision indicates that while it accepted as fact that Tipperreiter was cutting a pizza with a pizza cutter in his hand when an argument ensued, causing Anderson to be afraid, it also implicitly found that the evidence did not support a finding that Tipperreiter threatened Anderson with the pizza cutter as testified by Anderson, or threatened to physically harm her. The trial court's finding that no interspousal battery or domestic abuse occurred is therefore not clearly erroneous.[6] The trial court also

[6] In considering this argument, we have also considered Anderson's claim that the trial court's finding is based on an incorrect legal standard and a mistaken belief that the guardian ad litem had investigated whether domestic abuse occurred. We reject Anderson's argument that the trial court considered the domestic abuse allegation only in terms of determining whether placement of Bryanna with Tipperreiter was harmful, justifying modification of placement under WIS. STAT. § 767.451(1)(a). The record reveals that after the trial court reconsidered its initial determination that the case should be dealt with under the modification standard, it reviewed all relevant factors set forth in WIS. STAT. § 767.41(5), including whether there was evidence of domestic abuse as defined in WIS. STAT. § 813.12(1)(am). It found that there was not. Its finding is supported by credible evidence in the record indicating that Tipperreiter held a pizza cutter in his hand while arguing with Anderson and pointed it toward her over a counter, but did not hold it to her throat or threaten to inflict physical injury.

(continued)

found that Tipperreiter did not have an alcohol problem, thus rejecting Anderson's testimony on the subject. Like its other findings, this finding is not clearly erroneous.

¶23 In weighing the placement factors, the trial court also considered that both the guardian ad litem and the court-appointed custody evaluator recommended that primary physical placement be awarded to Tipperreiter. Ultimately, it concluded that primary placement with Tipperreiter was in Bryanna's best interest. Because this meant she would reside primarily in Florida, it established a placement schedule that took into account the geographical distance between the parties, and the fact that Bryanna was approaching school age.[7] Based upon the trial court's findings, and because it considered all appropriate factors under WIS. STAT. § 767.41(5), no basis exists to conclude that the trial court erroneously exercised its discretion by awarding primary placement

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We also reject Anderson's claim that the trial court's decision is based on a mistaken belief that the guardian ad litem investigated whether domestic abuse occurred. While the trial court questioned the guardian ad litem about the incident, the guardian ad litem stated that he could not "speak to that." The trial court then asked whether the guardian ad litem believed the incident constituted a "substantial serious incident of spousal battery or domestic abuse," and the guardian ad litem explained why he did not believe it was. Although the guardian ad litem did not speak about a threat of injury, he spoke of the lack of evidence corroborating Anderson's version of the incident and the lack of evidence of injury. The trial court ultimately stated that it agreed with the guardian ad litem that there was no serious incident of interspousal battery. However, it further found no domestic abuse. Nothing in the record leads us to conclude that the trial court believed that Tipperreiter threatened Anderson with the pizza cutter, but applied an incorrect legal standard in considering this factor under WIS. STAT. § 767.41(5)(am)13. or (bm).

[7] While the placement schedule after August 23, 2009 involves lengthier periods of time between placement with Anderson than occurred in the past, it takes into account the distance between the parties' homes and the fact that Bryanna is growing older. The length of time between placement periods, standing alone, therefore does not establish an erroneous exercise of discretion

to Tipperreiter, with secondary placement to Anderson in accordance with the schedule established by it.

¶24 Anderson's final argument is that the trial court erred by prospectively modifying child support. However, as recognized by Anderson, the requirement that she begin paying child support on September 1, 2009 was based on the change in the placement schedule that occurred on August 23, 2009. Because the change in placement was permissible and reduces the amount of time that Bryanna is with Anderson, Anderson has shown no basis to disturb the child support award.[8]

By the Court.—Order affirmed.

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

[8] While Anderson contends that the parties' respective incomes could change, a motion to modify child support may be filed if a substantial change in either party's income occurs.