COURT OF APPEALS DECISION DATED AND FILED

September 3, 2003

Cornelia G. Clark
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. 01-2436

Cir. Ct. No. 90FA903638

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN RE THE MARRIAGE OF:

JAN RAZ,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

MARY BROWN,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

CROSS-APPEAL from orders of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Jan Raz cross-appeals from trial-court orders modifying physical placement and child support, and from an order denying his

motion challenging the constitutionality of Wisconsin child-support guidelines. Raz claims that the Wisconsin physical-placement statutes violate the due-process and equal-protection clauses of the Fourteenth Amendment to the United States Constitution. He also alleges that the trial court erroneously exercised its discretion when it denied his motion for retroactive modification of a child-support order. We affirm.

I.

¶2 The facts of this case were set out at length in our earlier decision, *see* ***Raz v. Brown***, No. 01-2436, unpublished slip op. (Wis. Ct. App. July 16, 2002), and will not be repeated here except to note that Mary Brown appealed and Jan Raz cross-appealed from trial-court orders modifying physical placement and child-support. Brown's appeal was decided in the July 16 opinion. Brown's reaction to Raz's cross appeal is recited in an order we issued:

> Counsel for Mary Brown has submitted a letter indicating that the appellant-cross-respondent does not intend to file either a reply brief or a responsive brief in the cross-appeal. Before accepting this notification in lieu of a responsive brief in the cross-appeal, this court must be assured that the cross-respondent has decided not to file a responsive brief with a full understanding of the possible consequences. "Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." ***Charolais Breeding Ranches v. FPC Securities***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).
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> Therefore,
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> IT IS ORDERED that counsel for Brown shall, within ten days of the date of this order, either file a responsive brief in the cross-appeal or file a brief letter indicating that Brown has decided not to file a responsive brief with the complete understanding that any issues raised in the cross-appeal and not refuted as a result of not filing the responsive brief may be construed by this court as conceded.

Brown wrote a letter informing us that she was not going to file a response brief because, in her view, the cross-appeal lacked merit. We affirmed Brown's appeal and summarily reversed and remanded the cross-appeal pursuant to WIS. STAT. RULE 809.19(3)(a) (1999–2000),[1] because we concluded that Brown violated the rules of appellate procedure by not filing a response brief.

¶3 Our decision was reversed by the supreme court. ***Raz v. Brown***, 2003 WI 29, 260 Wis. 2d 614, 660 N.W.2d 647. As permitted by the supreme court decision, ***id.***, ¶37, we ordered additional briefs. Brown has filed a response brief and Raz has replied. Pursuant to the supreme court's direction, we now consider Raz's cross-appeal. ***Id.***

II.

A. Physical Placement

¶4 Raz first argues that the Wisconsin statutes related to physical-placement, WIS. STAT. §§ 767.045(1)(a)2, 767.045(4), 767.11(10), 767.11(14), 767.24(4)(a), 767.24(5), and 767.325(1)(b), violate the due-process and equal-protection clauses of the Fourteenth Amendment to the United States Constitution. Raz also claims that he is entitled to costs under WIS. STAT. RULE 806.04(10), to compensate him for these alleged violations. Raz has a heavy burden on appeal:

> A statute is presumed to be constitutional and will be held unconstitutional only if it appears so beyond a reasonable doubt. The burden of establishing the unconstitutionality of a statute is on the person attacking it, who must overcome the strong presumption in favor of its validity.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

State v. Lindsey, 203 Wis. 2d 423, 432, 554 N.W.2d 215, 218 (Ct. App. 1996) (citations omitted). Our review of the trial court's decision is *de novo*. ***Id.***

¶5 Raz claims that the physical-placement statutes violate the due-process clause of the Fourteenth Amendment because they "deprived [him] of a fundamental liberty interest of equally participating in the raising of his children." According to Raz, this violates both substantive and procedural due process. We address each claim in turn.

¶6 Substantive due process protects fundamental rights and "bars, among other things, certain arbitrary government actions, regardless of the fairness of the procedures used to implement them." ***State v. Radke***, 2002 WI App 146, ¶6, 256 Wis. 2d 448, 647 N.W.2d 873, *aff'd*, 2003 WI 7, 259 Wis. 2d 13, 657 N.W.2d 66. A statute that does not infringe a fundamental right will generally be constitutional if it is rationally related to a legitimate government interest. ***Id.***, ¶7.

¶7 Raz appears to rely on ***Troxel v. Granville***, 530 U.S. 57 (2000), to argue that he has a fundamental right to equal placement periods with his children. ***Troxel*** is inapposite. In ***Troxel***, the United States Supreme Court held that the application of a child-visitation-rights statute giving paternal grandparents visitation rights violated the mother's right to raise her children. ***Id.***, 530 U.S. at 68–75. In doing so, the Court reaffirmed that the liberties protected by the due-process clause include "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." ***Id.***, 530 U.S. at 66.

¶8 Raz asks us to declare that the Wisconsin physical-placement statutes are unconstitutional under this broad principle. We decline to apply ***Troxel*** for two reasons. First, the facts of this case are distinguishable. ***Troxel*** involved a dispute between a parent and two grandparents. In contrast, this case

involves a dispute between two parents, with equal rights, after a divorce. Second, the legal principle in ***Troxel*** is not in dispute. In Wisconsin, parents have a fundamental right to the care and custody of their children. *See* ***Barstad v. Frazier***, 118 Wis. 2d 549, 556–557, 348 N.W.2d 479, 483 (1984). This does not mean that parents have a "fundamental right" to "equal placement periods" after a divorce. Raz has not demonstrated how or why, following a divorce between parents, the state does not have the right to arbitrate any dispute those parents may have over what happens to their children. *See* ***LeClair v. LeClair***, 624 A.2d 1350, 1357 (N.H. 1993) ("The legislature contemplated the need to have … heightened judicial control over divorced families because of unique problems that exist in a home that is split by divorce."); 1987 Wis. Act 355, § 1 ("[I]t is the public policy of this state that unless there is a specific reason to the contrary it is in the best interest of a minor child to have frequent associations and a continuing relationship with both parents.").[2]

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[2] The statutes were revised in 1987 after the special committee on custody arrangements made findings that the then current laws relating to physical placement:

> 1. Do not adequately stress the importance of the best interest of the child and the significance to the child, in most cases, of a continuing, meaningful relationship with both parents.
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> 2. Often increase the anger and polarization of divorcing or separating parents by emphasizing the adversarial nature of custody determinations, instead of providing the parents with the information and dispute resolution mechanisms necessary to plan for the future care of their children.
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> 3. Encourage the use of joint custody as a bargaining chip by permitting one parent to veto joint custody, despite the willingness of both parents to maintain an active role in raising their children and despite the apparent ability of the parents to cooperate in the future decision making required by an award of joint custody.

(continued)

¶9 Raz also fails to show that the procedures by which the trial court made its decision regarding the children were constitutionally inadequate. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in life, liberty, or property is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." ***Casteel v. McCaughtry***, 176 Wis. 2d 571, 579, 500 N.W.2d 277, 281 (1993) (emphasis in ***Casteel***) (quoted sources omitted). "[D]ue process is satisfied if the statutory procedures provide an opportunity to be heard in court at a meaningful time and in a meaningful manner." ***Makos v. Wisconsin Masons Health Care Fund***, 211 Wis. 2d 41, 46, 564 N.W.2d 662, 663 (1997) (quoted source omitted), *overruled on other grounds by* ***Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund***, 2001 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849.

¶10 In this case, Raz had an opportunity to be heard at a meaningful time in a meaningful manner. The trial court held approximately nine hearings over the course of three years. At least three of these hearings addressed the issue of physical placement. Raz testified at these hearing and offered numerous exhibits into the record. At the conclusion of the proceeding, the trial court granted the relief that Raz requested and modified the placement order so that Raz would have equal placement of the children with Brown. Raz has not shown how the physical-placement statutes violate procedural due process.

> 4. Provide for an extremely high standard for postjudgment changes in custody by requiring that the current custodial conditions of the child be harmful to the child's best interest before a change may be ordered.

1987 Wis. Act 355, FINDINGS.

¶11 Raz also alleges that the physical-placement statutes violate the equal protection clause of the Fourteenth Amendment. Equal protection and substantive due process overlap in certain situations. For example, like the substantive-due-process clause, the equal-protection clause protects fundamental rights. *See* ***State v. Smart***, 2002 WI App 240, ¶¶5, 11, 257 Wis. 2d 713, 652 N.W.2d 429. Insofar as Raz alleges that he has a fundamental equal-protection right to equal placement, he has not demonstrated beyond a reasonable doubt that the provisions he attacks violate the Constitution.

¶12 While there is some overlap, substantive due process and equal protection are not identical. The equal-protection clause is violated when the government treats persons who are similarly situated differently, while the substantive-due-process clause is violated when the government treats someone irrationally, even if it treats everyone similarly. *See* ***Radke***, 256 Wis. 2d 448, ¶20. Raz appears to suggest that the physical-placement statutes violate equal protection because they impermissibly create a quasi-suspect classification based on sex. *See* ***Craig v. Boren***, 429 U.S. 190, 197 (1976) (classifications based on sex are subject to intermediate scrutiny).

¶13 To support his claim, Raz cites to a report purporting to show that "mothers are awarded greater placement 90% of the time." Thus, he claims that the statutes discriminate against fathers as a "group" because they "prevail" in only about ten percent of physical-placement cases. This does not show how or where the physical-placement statutes create an impermissible classification by any of the statutes he attacks. Indeed, WIS. STAT. § 767.24(5) specifically prohibits physical placement based on sex: "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."

¶14 As noted, Raz asks us to remand this case for a determination on costs under WIS. STAT. RULE 806.04(10), the Uniform Declaratory Judgments Act.[3] A court may, in its discretion, award equitable and just fees under RULE 806.04(10). ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 746, 351 N.W.2d 156, 168 (1984). Raz has not prevailed. He is not entitled to costs.

B. Child Support

¶15 Finally, Raz alleges that the trial court erroneously exercised its discretion when it failed to retroactively modify a June 1996 child-support order. Raz claims that he overpaid $35,804.00 in child support from October 22, 1998, the date he filed a motion to modify child support, to June 7, 2001, the date the trial court modified the child-support order.[4] While Raz initially appeared to challenge the trial court's ruling on constitutional grounds, in his reply brief he clarifies that he is not "challeng[ing] the constitutionality of the child support statutes or standard"; rather, he is challenging what he calls the trial court's failure to "exercise its responsibility." Accordingly, we turn to the issue of whether the trial court erroneously exercised its discretion.

¶16 A modification of child support is a discretionary act of the trial court that we will not disturb absent an erroneous exercise of discretion. ***Burger v. Burger***, 144 Wis. 2d 514, 523, 424 N.W.2d 691, 695 (1988), *superseded by*

[3] WISCONSIN STAT. RULE 806.04(10) provides: "In any proceeding under this section the court may make such award of costs as may seem equitable and just."

[4] Under WIS. STAT. § 767.32(1m), a court may only revise child support, family support, or maintenance from "the date that notice of the action" to revise "is given" to the other party, "except to correct pervious errors in calculations."

statute on other grounds as stated in ***Woodmansee v. Woodmansee***, 151 Wis. 2d 242, 444 N.W.2d 393 (Ct. App. 1989). Proper exercise of this broad discretion exists where the record reflects that the court considered the needs of the custodial parent and children and the ability of the noncustodial parent to pay. ***Id.***, 144 Wis. 2d at 524, 424 N.W.2d at 695; *see also* WIS. STAT. § 767.25(1m). A party who claims that the trial court erroneously exercised its discretion has the burden of showing a misuse of discretion and we will not reverse unless an erroneous exercise of discretion is clearly shown. ***Colby v. Colby***, 102 Wis. 2d 198, 207–208, 306 N.W.2d 57, 62 (1981).

¶17 The trial court found that Raz was not entitled to a retroactive modification of child support because he did not submit adequate proof:

> Now as to Mr. Raz, he has questions about arrears. There are, the court will find there are no arrears to date that have been proven to this Court's satisfaction. The father throughout this litigation was given more placement, particularly last summer. This was done as an experiment by this Court to see if extension or equal placement could work. To the best we can determine it has partially worked, or I think it will work in the future. And the parties should attempt to make it work for the short time that these children remain in their minority. Make it work.
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> So the Court is only going to look perspectively [sic] as to any arrears, or any support, there are no arrears. That's the finding of this court.

Raz does not refute this finding or allege that the trial court failed to consider the appropriate factors. Instead, he points to "proposed" administrative changes to the existing child-support guidelines to show that the trial court erroneously exercised its discretion by, apparently, not applying changes not yet adopted. We disagree. The trial court did not erroneously exercise its discretion.

C. Frivolous Appeal Costs

¶18 Brown seeks to have us award to her frivolous appeal costs under WIS. STAT. RULE 809.25(3). Although Raz's cross-appeal, undertaken *pro se*, did not prevail, and although his arguments were ultimately determined by us to be without merit, we cannot say that his cross-appeal falls within RULE 809.25(3). Accordingly, we deny Brown's motion.

By the Court.—Orders affirmed.

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