COURT OF APPEALS
DECISION
DATED AND FILED

December 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2875 **Cir. Ct. No. 99FA4997**

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

IN RE THE MARRIAGE OF:

ARMUND M. JANTO,

PETITIONER-RESPONDENT,

V.

MONICA L. JANTO,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Monica L. Janto appeals from the divorce judgment entered after a contested trial and subsequent court orders following post-trial hearings. She argues that the trial court erred by unlawfully delegating authority to the guardian ad litem, refusing to replace the guardian ad litem,

making various orders concerning the custody and physical placement of her daughter, dividing the debts and tax refunds, and reducing her maintenance. She also contends that justice miscarried, and, pursuant to WIS. STAT. § 752.35 (1999-2000),[1] she seeks a reversal of the trial court's decision and a remand to the trial court for further proceedings. We affirm.

I. BACKGROUND.

¶2 Armund and Monica Janto were married in 1979. They were divorced on February 2, 2001, after a contested trial heard sporadically over the course of several months. Two children were born of the marriage, but only their then-fourteen-year-old daughter, Sophie, was a minor at the time of the divorce. After hearing testimony, the trial court determined that the best interests of Sophie would be served by awarding her sole custody to her father. Because of what the trial court perceived as Mrs. Janto's long-standing problems, Sophie's physical placement with her was ordered to be supervised. The time of this supervised placement was left to the discretion of the guardian ad litem. The trial court also awarded maintenance of $3500 per month to Mrs. Janto. In its property division, the trial court awarded Mr. Janto the joint tax refund of the parties and ordered Mrs. Janto to assume the payment of her bills.

¶3 Although the divorce was granted in February 2001, the findings of fact and conclusions of law were not signed by the court until September 2001. Following the divorce, numerous problems arose between the parties. Mrs. Janto brought several motions seeking both changes in the property division and

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

enforcement of the property division. Mr. Janto brought several contempt proceedings against Mrs. Janto. Ultimately, the trial court suspended the supervised placement because of Mrs. Janto's actions. At a subsequent hearing, Mrs. Janto's maintenance was also reduced to $2200 per month after the trial court was advised that the family home had been sold and Mrs. Janto no longer had approximately $2000 of monthly household expenses.

II. ANALYSIS.

¶4 On appeal, Mrs. Janto's major complaints center on the placement orders of her daughter and the conduct of the trial court and the guardian ad litem. Mrs. Janto contends the trial court unlawfully delegated authority to the guardian ad litem and failed to remove and replace the guardian ad litem after she evidenced bias against her. She also argues that the trial court erred in removing her daughter from her home, in restricting her placement with her, in improperly revising the placement within two years of the original order without making the proper findings, and in conditioning the resumption of contact with Sophie on the mutual agreement of the child, the guardian ad litem, Mrs. Janto's counselor, and Mr. Janto.

A. Removal of the guardian ad litem.

¶5 Mrs. Janto challenges the trial court's selection and retention of the guardian ad litem for her daughter. We find her argument without merit.

¶6 A guardian ad litem's role is set forth in WIS. STAT. § 767.045:

> **Guardian ad litem for minor children. (1)** APPOINTMENT. (a) The court shall appoint a guardian ad litem for a minor child in any action affecting the family if any of the following conditions exists:

> ….
>
> 2. Except as provided in par. (am), the legal custody or physical placement of the child is contested.
>
> ….
>
> **(4)** RESPONSIBILITIES. The guardian ad litem shall be an advocate for the best interests of a minor child as to … legal custody, physical placement and support. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of the minor child or the positions of others as to the best interests of the minor child. The guardian ad litem shall consider the factors under s. 767.24 (5) and custody studies under s. 767.11 (14). The guardian ad litem shall review and comment to the court on any mediation agreement and stipulation made under s. 767.11 (12). Unless the child otherwise requests, the guardian ad litem shall communicate to the court the wishes of the child as to the child's legal custody or physical placement under s. 767.24 (5) (b). The guardian ad litem has none of the rights or duties of a general guardian.

¶7 The role of a guardian ad litem was further amplified in ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 485 N.W.2d 442 (Ct. App. 1992):

> [Section 767.045(4)] clearly states that the guardian ad litem shall be an advocate for the *best interests* of a minor child and that the guardian ad litem shall not be bound by the wishes of the minor child. This means that the guardian ad litem does not represent a child *per se*. Rather the guardian ad litem's statutory duty is to represent the *concept* of the child's best interest.

Id. at 536 (emphasis in original). Thus, a guardian ad litem must function independently from the parents and be concerned only with the child's best interests.

¶8 Mrs. Janto posits that the guardian ad litem was not a "diligent, unbiased and objective advocate for Sophie's best interest." First, we note Mrs. Janto never filed any formal motion seeking to remove the guardian ad litem or

review her determinations. Although Mrs. Janto did voice her displeasure with the guardian ad litem in an ex parte letter sent to the trial court, the only stated reason in her letter for her belief that the guardian ad litem was biased was that, she alleged, the guardian ad litem's husband was engaged in similar litigation. She failed to substantiate whether that was true and failed to explain why, if true, the guardian ad litem's husband's litigation resulted in the guardian ad litem being biased against her. Despite isolated references to the guardian ad litem's actions,[2] Mrs. Janto can point to no guardian ad litem action that was contrary to the child's best interests. At a hearing, she claimed the guardian ad litem failed to listen to Sophie. However, Mrs. Janto's own attorney told the trial court that "the guardian ad litem has been extremely diligent in her efforts in this case." We see nothing in the record which suggests the guardian ad litem was biased against Mrs. Janto or acted inappropriately.

B. Delegation of Authority

¶9 Mrs. Janto next argues that the trial court "handed over the reins to the [guardian ad litem]," and, by doing so, "improperly ceded its discretionary authority to her." However, Mrs. Janto fails to note in her brief that she stipulated to permitting the guardian ad litem to exercise the discretionary authority she did. In seeking an adjournment of the trial, an oral stipulation was put on the record with Mr. and Mrs. Janto both present:

> [T]he parties agree that the [g]uardian ad [l]item shall have the authority to set an interim placement schedule, with said schedule subject to change during the pendency

[2] Mrs. Janto's brief accuses the guardian ad litem of precipitating the police pickup of Sophie at her mother's home and transporting her to her father's house. This action was actually taken by Mr. Janto.

> of the action, as deemed appropriate by the [g]uardian ad [l]item. The parties understand that the placement schedule set forth by the [g]uardian ad [l]item will have the same force and effect as a Court Order.

¶10 Oral stipulations made in open court which are stated on the record and later reduced to writing are valid and binding. *See* ***Schmidt v. Schmidt***, 40 Wis. 2d 649, 653-54, 162 N.W.2d 618 (1968); *see also* WIS. STAT. § 805.05. Parties in divorce proceedings can enter into binding agreements, so long as they are not otherwise against public policy, even where the court would not have the authority or jurisdiction to impose such terms and provisions. *See* ***Bliwas v. Bliwas***, 47 Wis. 2d 635, 640, 178 N.W.2d 35 (1970); ***Rintelman v. Rintelman***, 115 Wis. 2d 206, 208-09, 339 N.W.2d 612 (Ct. App. 1983). Here, Mrs. Janto approved of this delegation of duties on the record, and therefore, is in a poor position to now object to what she agreed to in court.

¶11 The parties also stipulated to allow the guardian ad litem the power to decide Sophie's high school if the parties could not reach an agreement. The same was true for selecting a therapist for Sophie – if the parties could not agree, the guardian ad litem was to make the selection. Subsequent to this agreement, the guardian ad litem stepped in to make decisions regarding Sophie when the parties failed to reach an agreement. Thus, the guardian ad litem was authorized to decide which high school Sophie would attend and who would be her therapist. She was also authorized to seek a temporary order removing Sophie from the home of her mother in order to enroll her in the high school chosen by the guardian ad litem after Mrs. Janto continued to violate the placement order and refused to cooperate.

¶12 Mrs. Janto specifically relies on two cases in support of her position: ***Biel v. Biel***, 114 Wis. 2d 191, 336 N.W.2d 404 (Ct. App. 1983); ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 504 N.W.2d 433 (Ct. App. 1993). However,

these are inapposite. In ***Biel***, the trial court improperly required the parties to arbitrate the custody issues. In ***Trieschmann***, the trial court failed to exercise its discretion and simply adopted one set of the submitted findings of fact and conclusions of law without stating any reasons for the choice. Neither of those scenarios is present here.

C. Supervised Physical Placement Order

¶13 Mrs. Janto claims that the trial court erroneously exercised its discretion when it ordered sole custody of Sophie to Mr. Janto and permitted only supervised visitation with her. In later revising the order and suspending all contact with her unless certain conditions were met, Mrs. Janto also submits that the trial court erred: (1) in not making the required findings under WIS. STAT. § 767.325(1); (2) in making no record of its conversation with Sophie at the post-trial hearing; and (3) unlawfully requiring the consent of Sophie, her father, the guardian ad litem and her counselor before visitation would be resumed. We disagree.

¶14 Custody determinations are committed to the sound discretion of the trial court. *See* ***Gould v. Gould***, 116 Wis. 2d 493, 497, 342 N.W.2d 426 (1984). Here, the trial court held an eleven-day trial, heard the testimony of the parties, learned of their daughter's preferences, and listened to the testimony of various witnesses, including the expert witness asked to conduct a psychological examination of the parties. In its oral decision at the close of testimony, the trial court noted that Mrs. Janto, in dealing with her children, "comes across … in a way that is controlling, domineering, excessive, demanding, inflexible, as someone difficult to work with, on a day-to-day basis." With respect to Sophie's preference, the trial court noted:

> [Sophie] on the other hand [has] feelings of really [sic] intimidation and control and fear that mom will direct her and force her to do things that really are not in her best interest where she won't have much opportunity to discuss with her mom and dad which – and which makes for a difficult – very difficult pressure-filled, tension-filled lifetime for her, young Sophie. She can't handle that. She can't handle that, and it's going to impact more if we don't do something constructive with Sophie over the next few years.

These conclusions were supported by the expert witness. Dr. Marc J. Ackerman stated in his initial report:

> Unfortunately, this case brings with it unnecessary acrimony for a 14[-]year[-]old to be subject to. It is clear that Sophie cannot exist in her mother's environment in a healthy way. She has become over-burdened and parentified by her mother in the requirement that she continued to have to care for her mother's needs and be concerned about whether those needs are being met or not.
>
> In spite of court orders, and suggestions by others, [Mrs. Janto] has continued to engage in inappropriate behavior including going to Sophie's school to give her notes, to sit with her during testing, and other behaviors, even though there is a court order prohibiting her from going to the school for these activities.

At trial, Dr. Ackerman stated:

> Here's what we have with Sophie: Sophie is a terribly torn child. On one hand she does not want to spend a minute more with her mother than is absolutely necessary. She has a tremendous amount of difficulty dealing with her mother's behavior that she, by her own description, when asked what she would like to change about her mother, she said, how crazy my mother gets, referring to her screaming and crying. But on the other hand, she feels guilty about the fact that she feels like she doesn't want to spend any time with her mother. And this is the emotional tug-of-war that she's going through.

Clearly, it was Dr. Ackerman's impression that contact with Mrs. Janto was not in Sophie's best interest. The trial court agreed. Indeed, Sophie herself related to the

psychologist that she feels victimized by her mother and wishes she would seek professional help. Thus, there was ample support in the record for the trial court's initial custody and placement decision.[3]

D. Order Permitting No Physical Placement

¶15 At a subsequent hearing at which time Sophie spoke to the court, she reinforced the psychological harm she was suffering at the hands of her mother.[4] While Mrs. Janto claims the trial court modified the custody order within two years without making the findings necessary under WIS. STAT. § 767.325(1)(a)2, we determine § 767.325 is inapplicable here for the very reasons proffered by Mrs. Janto in her response to Mr. Janto's argument that the appeal time has run on this order.

¶16 Clearly, the trial court anticipated future hearings on the supervised placement issue as it did not dismiss the guardian ad litem and ordered the parties to complete certain programs in the near future. Thus, the supervised placement order was fluid at the time of the divorce; it was not a final order.

¶17 Moreover, even if WIS. STAT. § 767.325(1)(a) were applicable, evidence supplied at the trial and supplemented by testimony at the hearing,

[3] Mrs. Janto also claims that the custody and placement order should be overturned because she was not given warnings about the potential termination of her parental rights. Inasmuch as no action has been commenced seeking to terminate Mrs. Janto's parental rights, her claim is premature.

[4] Mrs. Janto makes much of the fact that the trial court made no record of the interview with Sophie. Once again, she fails to note that she agreed with this plan and even suggested that the trial court meet with Sophie alone. Thus, she cannot complain at this time to the method used to interview Sophie. Generally, the court, upon reviewing a matter, will not consider arguments or issues raised for the first time on appeal. ***In re Paternity of C.A.S.***, 185 Wis. 2d 468, 518 N.W.2d 285 (Ct. App. 1994).

specifically the testimony of Sophie, provided substantial evidence that the modification was necessary as the prior order was harmful to Sophie's psychological well-being.

¶18 Mrs. Janto also argues that the trial court's requirement that her visitation with Sophie be resumed only if Sophie, Mrs. Janto's counselor, the guardian ad litem, and her father agree, was an erroneous exercise of discretion. Mrs. Janto's supervised visitation was revoked when, after a hearing, it was learned that she had not let up on the abusive manner in which she treated her daughter. The trial court ruled that Mrs. Janto had to seek counseling in order to have visitation with Sophie (and then the other parties would have to agree), or she could elect to petition the court for a resumption of visitation.

¶19 A trial court has broad discretion with respect to placement determinations, the exercise of which will be given great weight on review. *See* ***Jocius v. Jocius***, 218 Wis. 2d 103, 110-11, 580 N.W.2d 708 (Ct. App. 1998). This particular trial court had presided over this trial for almost two years. The trial court was quite familiar with the facts and the history of the case. Its determination that supervised visitation would be suspended was only after Mrs. Janto proved herself totally intractable in following court orders. The trial court stated:

> Believe me, I wish I did not feel obligated to do this, but I'm doing this for the purpose of Number 1; which is the main purpose[] and almost the exclusive purpose, to protect Sophie; and Number 2, I want to help [Mrs. Janto] if I can. I don't know whether or not I'll be successful in that, but only time in the long run will tell.

Clearly, the record supplies a rational basis for the trial court's discretionary decision. To accept Mrs. Janto's logic is to suggest that the only way visitation

would occur in the future was if Mrs. Janto petitioned the court. However, the trial court was attempting to devise a method to resume contact without court assistance. This was to Mrs. Janto's advantage.

E. Maintenance Award

¶20 Mrs. Janto next submits that the trial court, at a post-trial hearing, erroneously exercised its discretion when it reduced her maintenance award. We disagree.

¶21 The amount and duration of maintenance are matters committed to the trial court's discretion. ***Siker v. Siker***, 225 Wis. 2d 522, 540, 593 N.W.2d 830 (Ct. App. 1999). WISCONSIN STAT. § 767.32 permits the reduction of maintenance if a substantial change in the cost of living has occurred to either party. At the time of trial, Mrs. Janto was responsible for the mortgage, taxes and insurance payments on the family home. These expenses amounted to approximately $2100 a month. The trial court ordered Mr. Janto to pay maintenance of $3500 a month. The family home was sold several months later. The trial court, at a hearing that Mrs. Janto refused to attend after receiving notice, reduced Mrs. Janto's maintenance to $2200 per month. She now argues that the trial court erred in making its determination in her absence. Because Mrs. Janto failed to provide the trial court with vital financial information that the trial court needed to assess the needs of both parties, she cannot now argue that this lack of information results in an erroneous exercise of discretion. A defendant cannot select one course of action in the trial court and then, on appeal, allege error brought about by that course of action. *See* ***State v. Robles***, 157 Wis. 2d 55, 60, 458 N.W.2d 818 (Ct. App. 1990) ("Such an election constitutes waiver or abandonment of the right to complain.").

F. Division of Debts

¶22 Mrs. Janto also appeals the trial court's division of debts and award of the total tax refund to Mr. Janto. Although WIS. STAT. § 767.255(3) creates a presumption that the parties' property will be divided 50/50, property division rests within the sound discretion of the trial court. ***Friebel v. Friebel***, 181 Wis. 2d 285, 293, 510 N.W.2d 707 (Ct. App. 1993). Mrs. Janto claims that by ordering her to be responsible for her own debts and awarding Mr. Janto the entire tax refund, the trial court failed to divide the property fairly. We disagree.

¶23 In October 1999, the parties entered into an agreement that any debts incurred separately would become the responsibility of the incurring party. Thus, Mrs. Janto had agreed to be responsible for her own debts. Mr. Janto was made responsible for his separate debts as well. Additionally, during most of the time the action was pending, Mrs. Janto remained unemployed. It had been contemplated that she would become employed; however, she failed to do so. As a result, Mr. Janto paid all the marital debt and he was the only one with any income. Also, Mr. Janto paid an unexpected college tuition bill for their son. Thus, the trial court properly exercised its discretion in making the parties responsible for their own debts and in awarding Mr. Janto the tax refund.

G. No Miscarriage of Justice

¶24 Finally, we address Mrs. Janto's claim that justice miscarried, and, pursuant to WIS. STAT. § 752.35, we should reverse the trial court. Because we have affirmed the trial court's rulings and can find no miscarriage of justice, we decline to do so. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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