COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0656 **Cir. Ct. No. 95 FA 953762**

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

IN RE THE MARRIAGE OF:

KATHLEEN M. DONOHOE,

PETITIONER-APPELLANT,

V.

STEVEN J. KLEBAR,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed and cause remanded with directions*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Kathleen M. Donohoe appeals from the trial court judgment, following a bench trial, awarding sole legal custody and primary

placement of her two minor children to their father, Steven J. Klebar. She argues that the court "abused its discretion" in determining that: (1) the children's best interests required that sole legal custody and primary placement be granted to Klebar; (2) the evidence rebutted the presumption for joint custody and shared placement; and (3) the children were not capable of making what she terms the "ultimate decisions as to what was in their best interests." We affirm.

I. BACKGROUND

¶2 The essential factual background is undisputed. As summarized in the trial court's factual findings, when Donohoe and Klebar were granted a divorce on May 13, 1997, they were awarded joint legal custody and shared physical placement of their three children (the eldest of whom reached age eighteen during the period of the trial court litigation leading to this appeal). To address the "significant inconsistencies in their parenting philosophy and techniques, as well as their evident inability to communicate with each other," the divorce judgment incorporated a mediation agreement that established an alternative dispute resolution system "to address these areas of conflict on an 'as needed' basis" with the assistance of a psychologist, Itzhak Matusiak.

¶3 In the years following their divorce, Donohoe and Klebar participated in the mediation process many times but, in October 1999, Donohoe declined to continue and the mediation process ended.[1] Klebar filed a motion to modify legal custody and physical placement; Donohoe then filed a motion for the

[1] The trial court found: "Dr. Matusiak testified that the mediation process ended when [Donohoe] chose not to continue her participation. [Donohoe] denies the same. The Court finds the testimony of Dr. Matusiak to be more credible than that of [Donohoe]." On appeal, Donohoe does not challenge the trial court's credibility call or finding.

same. *See* WIS. STAT. § 767.325(2) (1999-2000).[2] After hearing testimony from them, as well as from Dr. Matusiak and six other witnesses, the court found, in part:

> Both parents are concerned with the needs of the children and have a good relationship with the children.
>
> … [B]oth parties have, from time to time, disregarded the spirit of their mediation agreement and the responsibilities of a joint custodian, and have made unilateral decisions as it [sic] relates to education, health care and/or extracurricular activities of the children. Each parent has periodically undermined the other.
>
> Both parties have demonstrated an inability to work together under the current order.
>
> Both parents agree that their inability to communicate and their differing parenting styles impact adversely on the children.
>
> … [W]hat would otherwise[,] if occasional[,] be minor or trivial disputes have become injurious to the children because they have become a pattern of communication and a way of life.
>
> ….
>
> Both parties agree that they are unable to continue to share decision[-]making and placement of the children due to the adversarial nature, and it is not in the children's best interests. The Court concurs.

¶4 The trial court also considered the wishes of the two minor children who, through their guardian ad litem, expressed their desire for continued shared placement. The court found, however, that they were "not capable of making the ultimate decision as to what is in their best interest, given the testimony presented as to their academic and social levels, and taking into consideration their ages, 13

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated

and 10 ….” The guardian ad litem recommended that the court award sole custody to Klebar.

¶5 The trial court found that “there has been a substantial change in circumstances to warrant a modification of placement and custody,” and that “the presumption that having substantially equal periods of physical placement is in the best interest of the children has been overcome.” Finding that Klebar “demonstrated a better understanding of the needs of the children,” was “better able to prioritize and to strive to meet and promote the needs of the children,” and was “better able to provide structure and discipline” that the children needed “at this stage of their lives,” the court awarded him sole legal custody and primary placement, and set the placement schedule for both parents.

II. DISCUSSION

¶6 Donohoe acknowledges that “there is no dispute that a change in circumstances” warranted a modification of custody and placement. She argues, however, that the trial court “abused its discretion when it awarded [Klebar] sole custody and primary placement.” We disagree.

¶7 A child custody determination is within a trial court’s sound discretion. ***Johnson v. Johnson***, 78 Wis. 2d 137, 143, 254 N.W.2d 198 (1977). The supreme court has explained:

> [I]n child custody matters the decision of the trial court is to be given great weight upon review. Where the trial court finds that the best interests of the minor child are best served by awarding custody to one parent rather than the other, the award will not be upset unless this court is convinced that it is against the great weight and clear preponderance of the evidence, or unless it represents a clear [erroneous exercise] of discretion, or unless the trial court has applied an erroneous rule of law. The burden to

> be met by the party seeking to upset the award is a heavy one.

Allen v. Allen, 78 Wis. 2d 263, 271, 254 N.W.2d 244 (1977) (footnotes omitted). Where, as here, evidence favorable to each party is presented and certain testimony conflicts, "[t]he weight and credibility to be given to the testimony of each witness [is] a matter for the trial court to determine." *See* ***id.*** at 273. Moreover, in a divorce case, the determination of what is in the best interests of the children must "not easily be overturned" on appeal, particularly given the trial court's opportunity to "observe the conduct and demeanor of the witnesses." *See* ***Young v. Alderson***, 68 Wis. 2d 64, 74-75, 227 N.W.2d 634 (1975).

¶8 Donohoe fails to identify any way in which the trial court erroneously exercised discretion. She simply asserts that "it appears as if the [trial court] had a very difficult time determining what was in the best interest of the children," and then contends that the court should have given greater weight to certain testimony touting her ability to address the educational and medical needs of the children. From that, she jumps to her conclusion that the trial court's award of sole custody and primary placement to Klebar was "inconsistent with the testimony and evidence presented and even the Court's own findings."

¶9 Donohoe's argument consists of nothing more than a minimal re-argument regarding the significance of certain evidence she presented at trial. She ignores the additional evidence favoring Klebar. She specifically challenges none of the trial court's factual findings, and offers no reply to Klebar's response (in which the guardian ad litem joins) detailing the substantial evidence supporting his position and, ultimately, the trial court's findings and conclusions. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted argument deemed admitted).

¶10 Donohoe next argues that the trial court "abused its discretion when it determined that [Klebar] overcame the presumption of joint custody and shared placement being in the best interest of the children." *See* WIS. STAT. § 767.325(2)(b).[3] She contends that "[a]t no point was there any evidence presented that [she] had any adverse effects on the children or that [their] best interest would be promoted by a change in custody." Further, she maintains that because the trial court found that *both* she and Klebar "were equally at fault and … were credited with the successes and failure[s] of the children," the court should have concluded that the presumption had not been overcome. She is incorrect.

¶11 Once again, Donohoe has offered no substantial argument. Once again, she ignores the evidence on which the trial court relied. Donohoe simply offers her unadorned assertions, extensively quotes various portions of WIS. STAT. ch. 767, and concludes that the court should have continued shared placement or given "slightly more placement" to her. She fails, however, to provide any basis on which we could reject the trial court's findings or conclusions. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

¶12 And once again, Donohoe offers no reply to Klebar's detailed references to the testimony supporting the court's findings and conclusions, and to

[3] In response, Klebar notes that while WIS. STAT. § 767.24 establishes a presumption of joint legal custody, it does not establish such a presumption for joint placement. *See* ***Keller v. Keller***, 2002 WI App 161, ¶12, 256 Wis. 2d 401, 647 N.W.2d 426 ("While the physical placement statute … requires the court to provide for placement that allows the child to have regularly occurring, meaningful periods of physical placement with each parent, this is not tantamount to a presumption of equal placement.").

his brief's concluding argument (in which the guardian ad litem joins) on this issue:

> Both the Guardian ad Litem and Dr[.] Matusiak initially believed that Mr. Klebar should have primary physical placement of the parties' children at the time of the divorce. Only the parties' agreement prevented this from happening. Now, both parties have represented to the Court that the presumption of joint custody and shared physical placement was overcome. The children's teachers and principal testified that the children were harmed in their behavior and academic performance because of the parties' inconsistencies and that the most structured and involved parent to meet their behavioral and academic needs was Mr. Klebar. Dr. Matusiak testified that Ms. Donohoe was the party to refuse to cooperate in mediating issues in controversy. Ms. [Donohoe] made unilateral decisions by utilizing different physicians and dentists for the children without consulting Mr. Klebar and providing him with the names, resulting in the children having two different doctors and dentists at one time. Mr. Klebar also testified as to Ms. Donohoe's consistent interference and denial of his scheduled periods of placement of the children. There was testimony from all witnesses involved that substantiated the presumption of joint legal custody and shared physical placement was not only overcome, but that a continuation of the current order was proving to be harmful to the minor children.

See ***Charolais Breeding Ranches***, 90 Wis. 2d at 109 (unrefuted argument deemed admitted).

¶13 Finally, Donohoe argues that the trial court "abused its discretion when it determined that the children were not capable of making ultimate decisions as to what was in their best interests." She faults the trial court for reaching its conclusion without taking testimony directly from the two children, and without giving due regard to testimony from their teachers, principal, and guardian ad litem suggesting that the children "were mature beyond their years" and, therefore, "their opinion should have had more weight, or at least been

explored by the court rather th[a]n being dismissed by the court altogether." Donohoe is wrong again.

¶14 Under WIS. STAT. § 767.24(5)(b), the "wishes of the child" are among the numerous statutory factors a trial court must consider in determining legal custody and physical placement. *See* WIS. STAT. § 767.24(5). The child's wishes "may be communicated by the child or through the child's guardian ad litem or other appropriate professional." WIS. STAT. § 767.24(5)(b). Neither the guardian ad litem nor the trial court, however, is bound by the child's wishes. *See* ***Joshua K. v. Nancy K.***, 201 Wis. 2d 655, 660, 549 N.W.2d 494 (Ct. App. 1996). Donohoe has offered nothing to suggest that the trial court failed to consider or give appropriate weight to the children's wishes, as expressed by their guardian ad litem.

¶15 Klebar asserts that Donohoe's "sole motivation in seeking a reversal of the trial court's decision is to further her own interests and harass [him] by forcing him to incur exorbitant attorney[']s fees and stress," and that she "only seeks to have her needs … met, not those of the children." He further contends that her appeal has added to "the great chaos and the lack of finality" for the children. He asks, therefore, that Donohoe pay his attorney's fees, under WIS. STAT. § 814.025, for having to respond to her frivolous action. By joining in Klebar's brief, the guardian ad litem apparently agrees.

¶16 As we have observed, all of Donohoe's appellate arguments are insubstantial. And once again Donohoe offers no reply, thus conceding Klebar's claims about her motivation, legal action, and consequences for the children. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109. Therefore, we conclude that

Donohoe's appellate action is frivolous and, accordingly, we remand for the trial court's determination of appropriate attorney's fees.

By the Court.—Judgment affirmed and cause remanded with directions.

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