COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0974-FT **Cir. Ct. No. 00-FA-756**

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

IN RE THE CUSTODY OF KARL LANGENSTROER:

MARIA FISH,

PETITIONER-RESPONDENT,

V.

HARTMUT LANGENSTROER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Hartmut Langenstroer appeals from the order of the circuit court which determined custody and ordered child support. He argues on appeal that the circuit court erroneously exercised its discretion when it set

child support payments and granted sole custody to the mother of his son. Because we conclude that the circuit court did not erroneously exercise its discretion, we affirm.

¶2 Langenstroer and the respondent, Maria Fish, have never been married. They have one child, Karl. They lived together until August 2000 when Fish moved out. She eventually brought this action seeking custody, placement and child support. After a trial, the court awarded sole legal custody to Fish, with shared physical placement. Langenstroer was ordered to pay $100 per week in child support. The court also ordered that the child remain in day care. Fish moved for clarification and Langenstroer moved for reconsideration of the order. The court clarified the order but denied the motion for reconsideration.

¶3 Langenstroer argues on appeal that the circuit court erred when it awarded sole custody of the child to Fish. Specifically, he argues that the court erred because it applied only one of the statutory factors set out in WIS. STAT. § 767.24(5) (1999-2000). In arguing that the court acted improperly, Langenstroer relies on ***King v. King***, 29 Wis. 2d 586, 590, 139 N.W.2d 635 (1966). We do not agree that the ***King*** case controls here.

¶4 First, as the guardian ad litem has argued, we question the vitality of ***King*** given the date it was decided and the progress and development in the area of family law since that time. At the time ***King*** was decided, the child's mother was favored as a matter of course in custody decisions. The court in ***King*** expressly cited to this preference. ***Id.*** at 591. This preference, however, does not exist in today's world and has been expressly rejected by this court. *See* ***Pergolski v. Pergolski***, 143 Wis. 2d 166, 170, 420 N.W.2d 414 (Ct. App. 1988). We consequently question whether ***King*** remains good law.

¶5 Even if the rule in ***King*** were accepted, the phrase on which Langenstroer relies is: "Generally, no one factor is determinative of where custody should lie …." ***King***, 29 Wis. 2d at 590. This phrase begins with the word "generally." The use of this word means that the rule is not as absolute as Langenstroer suggests.

¶6 Further, we reject Langenstroer's argument that the court relied on only one factor. The court analyzed each of the enumerated statutory factors. The court considered that Fish had been the primary caretaker for the child, that the guardian ad litem recommended custody with Fish, and that Langenstroer had physically abused Fish before the child was born. Some of the other factors the court found were not relevant because of the child's young age. Langenstroer reads the court's decision much too narrowly. While the court later stated that it was awarding custody to Fish because of the lack of communication between the parties, the court also stated its conclusion was based on "the above facts." This language indicates that the court considered more facts than just the communication difficulties between the parties. Consequently, even assuming ***King*** remains viable and stands for the proposition Langenstroer asserts, the circuit court did not violate the rule.

¶7 Further, child custody determinations are committed to the sound discretion of the trial court. ***Gould v. Gould,*** 116 Wis. 2d 493, 497, 342 N.W.2d 426 (1984). The record fully supports the circuit court's factual finding that the parties were not able to reasonably communicate on matters concerning their son. While Langenstroer points to instances in which the parties were able to cooperate with each other, Fish points out other instances which support the court's conclusion that shared custody would not be in the child's best interest. We are not convinced that the circuit court erred.

¶8 Langenstroer also argues that the court penalized him for working when it considered the fact that Fish had been the primary caretaker. We do not read the court's comment in this light. We conclude that the circuit court was merely stating what was factually obvious—that Fish had stopped working after the child was born to care for her son, and that the child had lived with her since she and Langenstroer separated. Langenstroer was not being punished, but rather the court was recognizing the existing facts. We conclude that the circuit court did not err when it awarded sole custody to Fish.

¶9 Langenstroer challenges the circuit court's order that he pay $100 per week child support. Although the court awarded custody to Fish, it directed equal periods of physical placement. Under the statutes, the court is required to determine the amount of child support using the established shared time formula. WIS. STAT. § 767.25(1j). The law allows the court to deviate from this standard, however, upon a finding that the percentage is unfair to the child or any of the parties. Sec. 767.25(1m).

¶10 Langenstroer argues that the court erred because it relied solely on the disparity between the parties' incomes. The determination of the appropriate amount of child support is left to the discretion of the circuit court. ***Luciani v. Montemurro-Luciani,*** 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996). The court, however, did not deviate from the formula solely based on the disparity in incomes. The court noted that Langenstroer earned three times more than Fish, noting the parties' actual weekly gross incomes of $320 per week for Fish, and $1101 per week for Langenstroer. The court also considered the cost of day care and the award of placement to both parties. The court determined that under these circumstances, an award of $45 per week for child support would be unfair to both Fish and the child at this time. The court noted that even with the award of $100

per week child support, Fish's financial needs to care for the child were not being met. We agree with the court that these facts demonstrated unfairness to the child and to Fish.

¶11 Langenstroer argues that the ***Luciani*** case states that disparity of income may not, by itself, be considered. The ***Luciani*** case, however, was addressing a much different factual situation. In ***Luciani***, the issue was whether the formula can be ignored when the payee had a higher income than the payer. The court concluded that the formula could not be ignored simply because the payee earned more than the payer. *See* ***id.*** at 306. The court stated that "[a]bsent a showing that such disparity will adversely affect the children or the parties in some demonstrative manner, it is simply one among a number factors to be considered by the court …." ***Id.***

¶12 In this case, Fish, the payee, earned substantially less than the payer. Her financial needs were not even being met with the child support payment. In such a case, it was certainly appropriate for the court to consider the disparate incomes of the parties. The court considered the incomes as well as other factors and concluded that fairness to the child and to Fish required deviation from the formula. This was a proper exercise of discretion.

¶13 Langenstroer also challenges the circuit court's order that the child remain in day care. The circuit court ordered that the child remain in day care finding that the child needed the consistency and continuity of the day care setting. Langenstroer argues that it is in the child's interest to be with a parent when a parent is available. He contends that he should continue to be allowed to remove the child from day care when he has the time.

¶14 Langenstroer's argument, however, is too simplistic given the history of this case. As the circuit court noted when deciding the custody issue, the parties were not able to communicate reasonably or to cooperate in regards to the child. The facts established that Langenstroer would remove the child from day care without Fish's permission. The parties, particularly Langenstroer, were using the day care dispute to continue their battles with each other. As the circuit court noted at one point, the parties showed more concern for their own disputes than for the best interests of the child.

¶15 The circuit court's order preventing Langenstroer from removing the child from day care without Fish's permission was simply an attempt by the court to get Langenstroer to stop using the child as a tool in his battle with Fish. Because of this, the circuit court determined that the child needed the continuity and consistency provided by the day care setting. We conclude that the circuit court properly exercised its discretion when it ordered that the child remain in day care. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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