COURT OF APPEALS DECISION DATED AND FILED

March 19, 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. 02-1845

Cir. Ct. No. 97-FA-364

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

IN RE THE MARRIAGE OF:

JANICE RENEE MAXWELL,

PETITIONER-APPELLANT,

V.

JODY JUSTIN MAXWELL,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Janice Renee Maxwell appeals pro se from an order modifying the physical placement of her two children and requiring her to pay 75% of the costs and fees associated with the modification proceeding. She

argues that the modification interferes with the children's participation in activities, that it is based on improper factors and disregards the children's wishes, and that there is no basis to assess a greater portion of fees and costs to her. We conclude the circuit court properly exercised its discretion and affirm the order.[1]

¶2 Janice and Jody Justin Maxwell were divorced in 1998 and share joint legal custody of their two children. Because Jody resided outside of the state, Janice enjoyed primary physical placement of the children. Jody had physical placement for six weeks in the summer, spring break each year, and alternate holidays. In May 2001, Jody moved back to Wisconsin and took up residence near the children. He moved for modification of the physical placement schedule. Both parties represented themselves at the evidentiary hearing on the motion. The circuit court concluded that Jody's relocation to Wisconsin was a significant change of circumstances and it adopted a placement schedule which resulted in the children spending approximately 40% of their time with Jody. The order provided that the children could not participate in activities that would interfere with placement by the other parent unless the other parent agreed.[2] Janice was ordered to pay 75% of the costs of the proceeding, specifically the fees of the guardian ad litem (GAL), psychologist, Department of Social Services, and any mediator.

¶3 We first set forth our standard of review because Janice's pro se brief does not. The determination whether to modify a placement or custody order

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[1] We deny the guardian ad litem's (GAL's) motion for summary dismissal of the appeal.

[2] The provision reads: "Neither parent may enroll the children in ongoing activities that require participation by the child during time where the child would have placement with the other parent under the terms of this order. The parties may deviate from this provision ONLY with the affirmatively expressed permission of the other parent."

is directed to the circuit court's discretion. ***Keller v. Keller***, 2002 WI App 161, ¶6, 256 Wis. 2d 401, 647 N.W.2d 426. We affirm a circuit court's discretionary determination when the court applies the correct legal standard to the facts of record and reaches a rational result. ***Id.*** As a reviewing court, our task is to search the record for reasons to sustain the circuit court's exercise of discretion. ***Id.***

¶4 Placement of a minor child must be consistent with his or her best interest. WIS. STAT. § 767.325(1)(b)1.a (2001-02).[3] The determination of what is in a child's best interest is a mixed question of law and fact. ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992). We will not disturb the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). A custody determination depends on firsthand observation and experience with the persons involved. ***Gould v. Gould***, 116 Wis. 2d 493, 497, 342 N.W.2d 426 (1984). The circuit court, not the appellate court, judges the credibility of witnesses and the weight of their testimony. Appellate court deference considers that the circuit court has the opportunity to observe witness demeanor and gauge the persuasiveness of their testimony. ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

¶5 Janice first complains that the modification order displaces the children from their ongoing activities and therefore is not in their best interests. We disagree. It was not the circuit court's intent to cut the children off from their activities. The children can participate in the same activities as long as both parents agree that their placement time can involve those activities. Janice just

[3] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

assumes that Jody will refuse to agree to let the children participate in the same activities. It is an untested assumption given Janice's position that she did not feel she should have to seek Jody's approval before signing the children up for activities. Janice's argument is nothing more than a refusal to acknowledge that she is no longer the sole controlling parent of the children's daily lives.

¶6 In the long run the order is in the children's best interest because it forces these parents to work together for the good of their children. The psychologist and social worker both indicated that the children would be better off if these parents learned to communicate and cooperate with one another. It is a goal the court should foster at any opportunity because a child is not merely a football tossed between competing parents.

> In this case the record reveals deep animosity and ill-feeling between the young parents and their respective families. The child seems to be more of a football in the game of life than a player. A child has a right to grow up as naturally as he can under the circumstances of a divorce. Those things which will aid him in his normal development as a human being, the court should allow him; those things which will harm his development should be forbidden. It is difficult enough for a child of a broken home to find its way through life without having the added burden of being the victim of hatred and hostility between his parents and relatives. Divorced parents and their kin should remember it is not their wishes or desires which are at stake but the welfare of the child who did not ask to be placed in the tragic circumstances he finds himself.

Weichman v. Weichman, 50 Wis. 2d 731, 736, 184 N.W.2d 882 (1971).

¶7 Here the circuit court found that the parents engaged in "silly and juvenile actions" trying to gain "one-upsmanship with the other." It concluded that forcing agreement on activities was a way to foster cooperation. We conclude

that the circuit court properly exercised its discretion in adopting the activities provision.

¶8 Janice next argues that the placement schedule was changed without consideration of the children's wishes. Yet Janice acknowledges that the children's wishes were conveyed to the court by the social worker and psychologist who both testified that the children had stated they did not want any changes.[4] Janice herself informed the court of what the children wanted. The circuit court found that the children had been over-influenced by Janice's perceptions and coaching. This finding is not clearly erroneous. The social worker maintained, as she had since a report authored in 2000, that this is "one of the most blatant cases of children being put in the middle that this worker has ever seen." The psychologist explained how Janice was giving the children information about what was going on, court dates and the desired results. The circuit court's decision to discount the expressed wishes of the children was a proper exercise of discretion. ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 675, 599 N.W.2d 90 (Ct. App. 1999) (evidence on the factors relevant to determining the best interests of the child is given whatever weight the circuit court reasonably deems appropriate).

¶9 An additional dimension to Janice's claim that the circuit court disregarded the children's wishes is that the GAL ignored the children's wishes and therefore failed to act as an advocate for them. She characterizes the GAL as

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[4] Janice complains that the GAL did not convey the children's wishes. The court is not confined to hearing the children's wishes only from the GAL. The social worker and psychologist were appropriate persons to convey the children's wishes. *See* WIS. STAT. § 767.24(5)(b).

being negligent and unduly influencing the reports of the social worker and psychologist. Janice overlooks the true function of the GAL. The GAL does not act as a direct advocate for the children and is not confined to conveying the children's wishes to the court. Rather, the GAL is appointed to independently represent the concept of the children's best interests and is not bound by the wishes of the children. ***Wiederholt***, 169 Wis. 2d at 536. As the circuit court explained to Janice, contact between the GAL and the social worker and psychologist was necessary and expected. This is because the GAL performs an investigation unhampered by restrictions the court faces. ***Paige K.B. v. Molepske***, 219 Wis. 2d 418, 429, 580 N.W.2d 289 (1998). The GAL functions as an agent or arm of the court and aids the court by bringing information to the court "untainted by the parochial interests of the parents." ***Id.*** (citation omitted). There is every indication in this record that the GAL properly functioned in this respect.

¶10 As to the decision to modify the placement schedule, we conclude that the circuit court properly exercised its discretion. It first acknowledged the standard to be applied under WIS. STAT. § 767.325(1)(b) and the rebuttable presumption that adherence to the same schedule is in the children's best interest. It then explained that Jody's move back to Wisconsin made the old schedule inappropriate as it was formulated to accommodate travel time and expense. It found both parents and their households to be acceptable for placement. It looked to the psychologist's report that the children indeed did want to spent time with their father. It followed the psychologist's and social worker's recommendation on how to split time with the least amount of disruption. Finally, it believed and hoped that the schedule imposed would create the potential for some harmony in the children's lives. Appropriate factors were considered and the decision is reasonable.

¶11 Janice maintains that Jody, not herself, should be responsible for all the costs of this action.[5] The allocation of the home study, psychologist and GAL fees is a matter within the circuit court's discretion. A determination that one party has increased the overall fees is a finding of historical fact that will not be overturned unless clearly erroneous. *See* ***Zhang v. Yu***, 2001 WI App 267, ¶11, 248 Wis. 2d 913, 637 N.W.2d 754. An unequal division of fees is appropriate in a situation were one party has engaged in "overtrial."

> Overtrial is a doctrine developed in family law cases that may be invoked when one party's unreasonable approach to litigation causes the other party to incur extra and unnecessary fees. It may also involve abuse of judicial resources through the unnecessary over-utilization of those resources. A party's approach to litigation is unreasonable if it results in unnecessary proceedings or unnecessarily protracted proceedings, together with attendant preparation time. A circuit court may sanction a party who has engaged in overtrial by ordering that party to pay the opposing party's attorney fees. A sanction furthers two objectives, providing compensation to the overtrial victim for fees unnecessarily incurred, and deterring unnecessary use of judicial resources.

Id. at ¶13 (citations omitted).

¶12 The circuit court found that Janice's conduct prompted the bulk of expenses incurred. It also found that she had not produced any evidence to contradict the recommendations of the psychologist and social worker. It

[5] Janice faults Jody with commencing the modification proceeding. When Jody was living in Colorado he had physical placement for six weeks of summer vacation and alternating holidays. The placement order also granted him periods of placement at "other reasonable times upon reasonable notice." When Jody moved back to Wisconsin, he requested additional periods of placement. Janice refused and Jody moved for modification. Janice's unwillingness to work with Jody towards an agreement prompted court action. We further note that two police reports reflect that Janice continued to refuse additional periods of placement even after a court commissioner authorized additional placement.

implicitly concluded that her attempts to block increased placement with Jody were unreasonable. The record supports the court's assessment that Janice's anger prolonged the proceeding and foreclosed any possibility of agreement to a placement schedule without the lengthy evidentiary hearing.

¶13 The psychologist testified that Janice exhibited a lot of anger that fostered a need to keep the children away from Jody. The psychologist also found that Janice felt no responsibility or desire to make the children a part of Jody's life. Janice was also described as being in denial of her contribution to the conflict. The social worker echoed these observations. She also believed that Janice's proposed placement schedule was not motivated by the best interests of the children but in part by intertwined financial matters and Janice's own anger towards Jody's past mistakes.

¶14 The GAL reported that Janice continued to focus on past mistakes and anger resulting in a very uncooperative attitude. The GAL's recognition that Janice was unwilling to consider anything but her own proposal was reflected throughout the proceeding A letter authored by the GAL to Janice and her husband describes how Janice flatly refused the GAL's offer to help the parties reach an agreement as to placement. The letter reflects that the court, early in the process, advised Janice that she needed to find a way to put her anger behind her. The GAL tried to advise Janice that her position lacked a legal basis and was contrary to the children's best interest. Later an affidavit filed by the GAL reports that early in the modification proceeding, Janice threatened to move away with the children if the GAL continued to recommend increased placement with Jody. The affidavit also describes Janice's rejection of and refusal to discuss the recommendation of the social worker and psychologist when they presented it to her personally.

¶15 In summary, the record demonstrates that three professionals believed that the court hearing was a waste of time and that but for Janice's position, the matter should have been settled amicably between the parents. The circuit court's allocation of costs was a proper exercise of discretion.

¶16 Finally, the GAL asks that Janice's appeal be declared frivolous and costs and attorney fees assessed for that reason. WIS. STAT. RULE 809.25(3). Although we have rejected Janice's contention that the circuit court erroneously exercised its discretion, her appeal is not frivolous. We deny the GAL's motion.

By the Court.—Order affirmed.

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