COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1913 **Cir. Ct. No. 99-FA-23**

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

IN RE THE MARRIAGE OF:

LINDA M. HEATH-MILLER,

PETITIONER-APPELLANT,

V.

MARK A. MILLER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Burnett County: JAMES H. TAYLOR, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Linda Heath-Miller appeals an order denying her motion to modify the equal placement of her children. She argues that the trial court applied an erroneous legal standard. She further contends the court

erroneously exercised its discretion because it failed to articulate any basis for disregarding the recommendations of the guardian ad litem and psychologist. We reject her arguments and affirm the judgment.

¶2 Mark Miller and Linda Heath-Miller were divorced in August 2000. The divorce decree provided for joint legal custody of their children, Alisa and Jonas, and alternating weeks of physical placement. In October 2001, Linda brought a motion seeking primary placement. She alleged that she wanted to move approximately thirty miles away and would like the children to change school districts. She also alleged that Alisa was unhappy with the current arrangement. Mark objected on the ground that nothing had changed since the final divorce hearing and that Linda was essentially making the same assertions that she did then.

¶3 The court appointed a guardian ad litem, and the parties and their children participated in psychological evaluations. At trial, the psychologist testified that he performed personality tests and, as a result of the tests, he recommended the children's primary placement with Linda. He discussed many of the conflicts that led to the divorce, including the stress of the parties' work with missions in South America and that during that time Mark fathered a child out of wedlock. The psychologist believed that both were good parents; however, he favored Linda's approach to parenting and gave a number of reasons.

¶4 For example,[1] Linda, who worked as a nurse, had a parenting style that was "more appropriate, more nurturing to the children." Mark's style was

[1] We recognize that our factual recitation is not a complete description of the testimony at the day-long trial. Rather, we provide examples to illustrate the nature of the testimony.

"directive." Mark would send the children to their room when they were noncompliant and would talk to them later. The psychologist found this style contrary to Alisa's best interests, "because it doesn't help her to be able to challenge and interact with a dominant male world." He agreed that Jonas was adjusted to the placement arrangement.

¶5 The psychologist also testified Mark was "conflicted" because Mark believed in equality and also that the man should be head of the household. The psychologist believed this unresolved conflict was "harmful." On the other hand, the psychologist saw Mark as helpful and industrious. As a carpenter, Mark had remodeled two houses, one for himself and the children and, at the time of the their separation, one for Linda and the children. The psychologist testified: "I think he believes certain values are important, basic values, and I think he exhibits those and tries to make those present in the children's life." Nonetheless, the psychologist concluded, "I don't see him as qualified as Linda."

¶6 It was undisputed that the children are doing well in school. Mark testified that he spends time with the children doing creative things, such as nature hikes and building things. They built a tree house, where they go bird-watching. They also enjoy fishing, swimming and canoeing. Mark said that they talk together while they are playing or working. Mark has coached the children's soccer, basketball and wrestling activities. Mark and the children assist at their church, and Mark helps out with vacation Bible school in the summer.

¶7 Mark testified that modifying placement would limit the effect on his relationship with his children. He believed it better to continue the present equal placement arrangement because he and Jonas have a close relationship. As far as conflicts with Alisa, Mark testified that it would be better for him and Alisa

to attend counseling to resolve conflicts, rather than say that they would "move you out of this situation." He explained that he and Alisa got along fine until fall of 2001, when "preadolescent girl issues" arose, and "this is the first bump in the road that we have had." He stated, "I would be willing to do counseling with her to work this through rather than abandon ship with the first lump in the road."

¶8 At the close of trial, the guardian ad litem voiced his recommendation:

> Alisa's complaints have been consistent. She feels she is treated like a baby, she is unable to express her opinion, and her dad favors Jonas. …
>
> [The psychologist] says basically it's going to be a continuing problem with Alisa, and there will be problems with Jonas coming because of Mark's parenting style.
>
> I can't condemn Mark. He was consistent when I met with him ….
>
> I think [the psychologist's] recommendations are well thought out, and I think the Court should adopt them ….

¶9 The trial court determined that the guardian ad litem's approach was inconsistent with the legal standards it was to apply. The court explained: "[W]e have got a psychologist who decides who is the better parent" and makes a recommendation on that basis. The court observed: "[I]f we are going to do that, why don't we come up with a one-page test and give each parent the test and whoever scores the best, they get custody and placement?"

¶10 The trial court noted that if there was anything wrong with the children, it was because the parents were "confrontational" and "almost pernicious." The court stated that one would expect the children to learn the same

qualities. The court found that under any legal standard in WIS. STAT. ch. 767,[2] it was unconvinced that Linda had met her burden to modify custody and denied her motion. The court noted the communication difficulties between the parents, but determined that no harm would fall upon the children in maintaining the current arrangement. The court concluded that if the children develop behavioral problems, counseling for the parents would be in order.

¶11 The court found that the custody dispute was "really not an issue involving the children." The court viewed the dispute as "an issue between the parents, and I view the children as pawns as opposed to someone with real problems." It stated:

> I'm not convinced that this is anything more than a parental driven desire for control. I want the children for various reasons; and the same thing on the part of the father: I want the children for various reasons. So it isn't because the children are going to be harmed in any way. It isn't that they are going to excel with one parent and not with the other.

The court noted that Linda had not moved and, consequently, it was unnecessary to address a school district change at the time.

1. Standard of review

¶12 We review a trial court's decision to modify custody for an erroneous exercise of discretion. ***Licary v. Licary***, 168 Wis. 2d 686, 692, 484 N.W.2d 371 (Ct. App. 1992).http://web2.westlaw.com/Find/Default.wl?DB=595&SerialNum=1992103193&Fi

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

ndType=Y&ReferencePositionType=S&ReferencePosition=374&AP=&RS=WLW2.83&VR=2.0&SV=Split&MT=Wisconsin&FN=_top We will affirm a discretionary determination if it appears from the record that the trial court: (1) examined the relevant facts; (2) applied a proper standard of law and, (3) using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Our task as a reviewing court is to search the record for reasons to sustain the trial court's exercise of discretion. *See* ***In re R.P.R.***, 98 Wis. 2d 613, 619, 297 N.W.2d 833 (1980).

2. Legal standards

¶13 Linda argues that the trial court erroneously exercised its discretion by failing to apply the proper legal standards. She contends that her motion is based upon the application of WIS. STAT. § 767.325(2)(a) and (b). She argues that the proper legal standard is "the best interest of the children." She claims that nothing in the court's decision "provides any evidence of a rational process applied to the proper legal standard." She claims the court never mentioned the best interests of the children, and the court's "surmised motivation of this dispute" is not a valid basis on which to decide a custody dispute. We reject her arguments.

¶14 WISCONSIN STAT. § 767.325(2) governs modification of substantially equal physical placement orders.[3] Subsection (2)(a) provides that

[3] WISCONSIN STAT. § 767.325(2) reads:

> (2) MODIFICATION OF SUBSTANTIALLY EQUAL PHYSICAL PLACEMENT ORDERS. Notwithstanding sub. (1):

(continued)

"[i]f the parties have substantially equal periods of physical placement pursuant to a court order and circumstances make it impractical for the parties to continue [that arrangement] … a court ... may modify such an order if it is in the best interest of the child." Subsection (2)(b) provides that where circumstances do not make an equal placement impractical, the court may proceed under § 767.325(1)(a) and modify an equal placement within two years of the initial order if "modification is necessary because the current custodial conditions are physically or emotionally harmful" to the child's best interest. Additionally, there is a rebuttable presumption that equal placement is in the child's best interest under § 767.325(2)(b).

¶15 Linda does not argue, and the record does not illuminate, whether the trial court applied the standard set forth in WIS. STAT. § 767.325(2)(a) or (b).

> (a) If the parties have substantially equal periods of physical placement pursuant to a court order and circumstances make it impractical for the parties to continue to have substantially equal physical placement, a court, upon petition, motion or order to show cause by a party, may modify such an order if it is in the best interest of the child.
>
> (b) In any case in which par. (a) does not apply and in which the parties have substantially equal periods of physical placement pursuant to a court order, a court, upon petition, motion or order to show cause of a party, may modify such an order based on the appropriate standard under sub. (1). However, under sub. (1) (b) 2., there is a rebuttable presumption that having substantially equal periods of physical placement is in the best interest of the child.
>
> ….
>
> (5m) FACTORS TO CONSIDER. In all actions to modify legal custody or physical placement orders, the court shall consider the factors under s. 767.24 (5) and shall make its determination in a manner consistent with s. 767.24.

However, it does not matter because the trial court's findings support its decision under either standard. As noted earlier, the court ruled that Linda failed to make a threshold showing under any standard in ch. 767. The court's findings that the motion was driven by parental desire for control unmistakably imply that there has been no showing that continued placement is impractical, that any change had been substantial and, indeed, the record irrefutably supports those findings. Because the court's implicit findings support its decision under either the § 767.325(2)(a) standard, impracticability and best interest, or the § 767.325(2)(b) standard, a substantial change of circumstances and best interest, we do not overturn it on appeal. *See* ***Englewood Apts. Part. v. Grant & Co.***, 119 Wis. 2d 34, 39 n.3, 349 N.W.2d 716 (1984) ("[A] remand directing the trial court to make an explicit finding where it has already made unmistakable but implicit findings to the same effect would be both superfluous and a waste of judicial resources.").

2. Guardian ad litem's and psychologist's recommendations

¶16 Next, Linda faults the trial court for failing to march in lockstep with the guardian ad litem's and psychologist's recommendations, and derides the court's decision for failing to provide any adequate rationale. We are unpersuaded.

¶17 The guardian ad litem essentially adopted the psychologist's testimony. Matters of weight and credibility are for the trial court, not this court, to determine. WIS. STAT. § 805.17(2). A fact finder is not obliged to adopt expert testimony, even when it is uncontradicted, if something in the case discredits the testimony or renders it unreasonable. ***Capitol Sand & Gravel v. Waffenschmidt***, 71 Wis. 2d 227, 233-34, 237 N.W.2d 745 (1976). However, even if the court had accepted the psychologist's testimony, it was inadequate to support a threshold

showing that continued equal placement was impractical or that a modification was necessary to the children's best interests. *See* WIS. STAT. § 767.325(2).[4]

¶18 The record demonstrates that the court applied the correct legal standard and rejected the psychologist's and guardian ad litem's recommendations for failing to satisfy the appropriate legal standard. Because the trial court applied the proper standards and the record supports its decision, we do not overturn its denial of Linda's motion to modify physical placement.

By the Court.—Order affirmed.

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

[4] In her reply brief, Linda argues without citation to the record that it is undisputed that periods of equal placement have become impractical to continue. In our view, the record fails to support this contention. In any event, we do not review assertions unsupported by record citation. *See* WIS. STAT. RULES 809.19(1)(e) and 809.83(2); *see also* ***Grothe v. Valley Coatings, Inc.***, 239 Wis. 2d 406, 411, 620 N.W.2d 463 (Ct. App. 2000).