COURT OF APPEALS DECISION DATED AND FILED

March 18, 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. 02-2770-FT

Cir. Ct. No. 99-FA-73

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE MARRIAGE OF:

RYAN JOSEPH PIERCE,

PETITIONER-RESPONDENT,

V.

KIMBERLY JEAN PIERCE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Bayfield County: THOMAS J. GALLAGHER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kimberly Pierce appeals a judgment modifying primary placement of her daughter.[1] She argues that the trial court erroneously exercised its discretion when it modified placement without examining appropriate factors and failing to provide an explanation for its decision. We conclude that the court's decision reveals a rational basis for its ruling and therefore affirm the judgment.

¶2 When Ryan and Kimberly were divorced in June 2000, they both lived in Washburn. The parties agreed to joint legal custody of their daughter, Delaina, who was three years old at the time. They also agreed to equal periods of physical placement.

¶3 In the summer of 2001, Kimberly moved to Hurley because her boyfriend had a job there and they bought a house. Ryan agreed that Delaina could attend pre-kindergarten in Hurley two days a week.

¶4 In June 2002, Ryan petitioned for a modification of the placement arrangement. He alleged that a substantial change of circumstances occurred because Kimberly moved from Washburn to Hurley and equal placement no longer worked. At the hearing, he testified that most of his and Kimberly's extended families live in the Washburn and Ashland area and, therefore, he believed it was best for the child to have primary placement with him during the school year. No extended family members lived in the Hurley area. Hurley and Washburn are approximately a half-hour drive away.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-2002 version unless otherwise noted.

¶5 Ryan testified that as a self-employed certified public accountant, his hours were flexible. However, during tax season when he worked longer hours, his mother, father or sister would be available to watch Delaina after school. He also works at home after Delaina is asleep during tax season. He explained that when Delaina was with him, day care was unnecessary because either his family or Kimberly's family would watch her. Ryan testified that Delaina was a happy and outgoing five-year-old. She wanted to be with both parents and although she was sad during transition times, she seemed to be adjusting well.

¶6 Ryan testified that he lived with his girlfriend, who was pregnant with his child. He lived with her for the last few years, except for approximately four months when he lived in an apartment in Ashland near his office.

¶7 Kimberly testified to the effect that Delaina adjusted well to preschool in Hurley and made many friends. Kimberly believed that Delaina would be disappointed if she had to change schools and readjust to a new school and living environment. Delaina had expressed her desire to return to school in Hurley.

¶8 Kimberly agreed that summer visitations went well. She was concerned, however, with Ryan's long hours at work and believed that he would not be available to care for Delaina on a consistent basis. Kimberly testified that she was pregnant and that she planned to stop working for three years to be a full-time mother after her baby was born.

¶9 Both Ryan and Kimberly testified that the other was a good parent. The guardian ad litem agreed. She stated both parents were loving, both school systems were good, and Delaina clearly loves both her parents and is bonded to them. Delaina has also learned to be apart from each parent for an extended

period. She stated that she did not place weight on Delaina's preferences due to her age.

¶10 The guardian ad litem pointed out that because Delaina was starting school, equal periods of placement were impractical. Although it was a "close call," she recommended that Ryan have primary placement, explaining:

> [B]oth parents are in a comparable situation in that they're in a new relationship, they're expecting a new child with their partner, but neither one has expressed a long-term commitment by saying they're going to get married. Both have said they talked about it. … [T]hose relationships do not appear at this point to be as permanent as if they were married, and I'm not making a judgment about whether they get married or not, but my concern is the lack of the mother's ties to the Hurley area, if the relationship doesn't work out ….

The guardian ad litem believed that Ryan, who owns his own business, "is[n't] going anywhere." For that reason, she favored primary placement with Ryan in Washburn due to the extended family's presence and "all the ties to the community."

¶11 The trial court found that the presence of the extended family in the Washburn area was important to a child Delaina's age. The court noted that at Delaina's age, a change in school districts would not be problematic. The court agreed that Ryan's proposal was in Delaina's best interests because "it would maximize the time that the child spends with both parents and that is really important for a child of this age in meeting their developmental needs."

¶12 The trial court was faced with the circumstance where both parties were excellent parents. The court ultimately concluded that Delaina's best interests would be served by placement during the school year with Ryan. It ordered that Kimberly have weekend and summer placement. Kimberly appeals.

¶13 Kimberly argues that the trial court erroneously exercised its discretion because it offered virtually no explanation for its decision and no consideration of the pertinent factors under WIS. STAT. § 767.24. The trial court's decision was admittedly brief. However, we conclude that the record discloses a rational basis for the court's determination and, therefore, we do not overturn its ruling.

¶14 The trial court has "wide discretion" in making physical placement and custody determinations. ***Larson v. Larson***, 30 Wis. 2d 291, 303, 140 N.W.2d 230 (1966). 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&FindType=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).

¶15 Kimberly argues that the trial court erroneously exercised its discretion because it failed to consider the proper factors and that the record fails to support its decision. We disagree. WISCONSIN STAT. § 767.325(2) and (5)

governs modification of substantially equal physical placement orders.[2] Under these sections, the court is to consider the factors set forth in WIS. STAT. § 767.24(5).[3] Here, the trial court considered appropriate factors. In considering

---

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

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

[3] WISCONSIN STAT. § 767.24(5) reads:

> (5) FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS. In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian. The court shall consider the following factors in making its determination:
>
> (a) The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.

(continued)

(b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.

(c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.

(cm) The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.

(d) The child's adjustment to the home, school, religion and community.

(dm) The age of the child and the child's developmental and educational needs at different ages.

(e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.

(em) The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.

(f) The availability of public or private child care services.

(fm) The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.

(g) Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.

(h) Whether there is evidence that a party engaged in abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 48.02 (2).

(i) Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (a).

(continued)

the proximity of Delaina's extended family in Washburn, the court explicitly assessed weight to § 767.24(5)(c): "The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest." The record shows that this factor was significant in conjunction with § 767.24(5)(f): "The availability of public or private child care services." Also, the court considered the child's adjustment to the home, school, and community as well as her age and her developmental and educational needs. *See* WIS. STAT. § 767.24(5)(d) and (dm).

¶16 In addition, the record reveals that the court considered the parents' wishes when it reviewed their physical placement proposals submitted to the court at trial. *See* WIS. STAT. § 767.24(5)(b). Because of Delaina's age, it was reasonable for the court to not consider her wishes, as communicated by her mother and maternal grandmother. The record shows that there were no issues regarding child abuse or spousal battery. WIS. STAT. § 767.24(5)(h)(i). The cooperation and communication between the parties was good. WIS. STAT. § 767.24(5). Finally, it is evident that the court considered § 767.24(5)(em), "[t]he need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child" when it accepted Ryan's proposal in part because "it would maximize the time that the child spends with both parents."

(j) Whether either party has or had a significant problem with alcohol or drug abuse.

(jm) The reports of appropriate professionals if admitted into evidence.

(k) Such other factors as the court may in each individual case determine to be relevant.

¶17 Kimberly argues that the trial court erroneously found it was impractical to continue equal placement. She also argues that the court failed to explicitly find impracticality "obviously due to the absence of any evidence to support such a finding." Kimberly is wrong on both counts. First, the circuit court specifically found that "circumstances make it impractical to continue" substantially equal placement. Also, both Ryan and the guardian ad litem indicated that because the child was to start kindergarten, equal periods of placement were impractical during the school year because the parents live in different school districts.

¶18 Additionally, at the start of trial, Ryan's attorney stated that at the time of the divorce "[I]t was contemplated at that time that this issue where the child goes to school, when the child went to school full-time, might come up and it has. The parties aren't able to agree." This statement was undisputed.

¶19 We note that Kimberly fails to indicate she raised this issue at the trial court. Her testimony indicated that she essentially sought primary placement, not continued equal placement. A party who appeals has the burden to establish "by reference to the court record, that the issue was raised before the circuit court." ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (citation omitted).

¶20 Next, Kimberly argues that the trial court erroneously believed it was required to choose one of the two placement proposals the parents put before it, rather than exercise its discretion to fashion whatever schedule it determined would serve the child's best interests. We disagree. There is nothing in the court's decision to support this argument. In any event, this argument was not made to the trial court. *See* ***id.***

¶21 In a footnote, Kimberly argues that the original order for substantially equal placement was largely a legal fiction because Delaina actually spent the majority of time with her and, therefore, the court applied the wrong legal standard. Kimberly fails to indicate that she raised this issue before the trial court. *See* ***id.*** A party must raise an issue with some prominence to preserve it for appellate review. "We will not ... blindside trial courts with reversals based on theories which did not originate in their forum," ***State v. Rogers***, 196 Wis. 2d 817, 827, 829, 539 N.W.2d 897 (Ct. App. 1995), and "the appellant [must] articulate each of its theories to the trial court to preserve its right to appeal." ***Id.*** at 828-29.

¶22 Finally, Kimberly rhetorically asks: "Why should Ryan be permitted to characterize Kimberly's move to Hurley as a substantial change of circumstances warranting modification when he assented to that move more than one year earlier and allowed the changed circumstances to persist for the following year?" Kimberly neglects to cite authority for her implicit proposition that a substantial change of circumstances must be shown in order to modify placement under WIS. STAT. § 767.325(2)(a).[4] Because the statutory construction issue is not developed, we do not address it further. ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

¶23 The record demonstrates that the court considered appropriate factors supported by the record and reached a reasonable conclusion. Because the trial court considered the proper factors and applied the proper standards, and because its decision is clearly supported by the evidence in the record, the award of primary placement to Ryan must be upheld.

---

[4] *See* note 2.

By the Court.—Judgment affirmed.

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