COURT OF APPEALS DECISION DATED AND FILED

May 11, 2004

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. 03-2547

Cir. Ct. No. 99FA000144

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

IN RE THE MARRIAGE OF:

DANA M. LEDUC, F/K/A DANA M. HAYES,

PETITIONER-APPELLANT,

V.

PATRICK J. HAYES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Dana LeDuc appeals an order entered in this post-divorce child placement proceeding. She argues that (1) the trial court applied an erroneous legal standard when it denied her request to move to Illinois with the parties' two minor children; (2) the court engaged in an unreasonable construction

of WIS. STAT. § 767.327;[1] (3) her former husband, Patrick Hayes, failed to prove his objection to the children's move; and (4) the trial court's order violated her constitutional rights. We reject her arguments and affirm the order.

¶2 Patrick Hayes and Dana LeDuc were divorced in September 1999. They were awarded joint custody of their two sons, then ages two and three. Dana was granted primary placement under the terms of the marital settlement agreement. The children live in Chippewa Falls with Dana and her son from a previous relationship.

¶3 Patrick also lives in Chippewa Falls where he has a well-paid, stable job. The children were placed with him overnight every Tuesday and Thursday and every other weekend, Friday through Sunday, except when school was out, and then through Monday morning. The trial court found that this arrangement resulted in substantially equal placement, with Dana having 56-57% and Patrick having 43-44%.[2]

¶4 In 2003, Dana remarried and her husband planned to start a new job in Chicago. Dana filed a notice of her intent to remove the children, and Patrick filed his objection, a motion for an order prohibiting the move and a motion for modification of custody. A guardian ad litem was appointed, and a psychologist completed a custody study. The psychologist reported that the boys were well adjusted and happy in the present circumstances. He explained that although the parties shared parenting, Dana, as the stay-at-home mother, was their primary

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

[2] The trial court made a minor adjustment to the placement schedule, resulting in an increase in time spent with Patrick; this adjustment is not an issue on appeal.

caregiver and a more experienced hands-on parent. The psychologist was concerned, however, that her proposed move would seriously disrupt the children's relationship with their father. He recommended that the parties share legal custody and that Dana retain primary placement as long as she remained a stay-at-home mother and lived in or near Chippewa Falls.[3] Following the close of testimony, the guardian ad litem recommended that if Dana were to move to Chicago, it was in the children's best interests that primary placement be awarded to Patrick.

¶5 The court found that Dana's proposed move would disrupt the children's close relationship with Patrick and there was no reasonable alternative to maintain their present relationship. The court also concluded that the move was "arguably reasonable" from Dana's perspective, but it was unreasonable for the children. The court found that Patrick's mid-week placement would disappear, a lot of time on weekends would be spent in the car and there were no adequate alternatives to compensate for missed placement. Therefore, the court concluded that the children's best interests were served by continuing primary placement with Dana, provided that she remain in Chippewa Falls. The court concluded the children's best interests were served by remaining in their community because their father could continue his nearly day-to-day contact with them and attend their activities and teacher conferences. Remaining in their community would also

[3] In her statement of facts, Dana states that the psychologist testified that if Dana were to move, he recommended the children move to Illinois rather than transfer placement to Patrick. We conclude that this statement greatly simplifies and fails to accurately describe the psychologist's testimony.

Dana's statement is, at best, an inference from the testimony. An inference from a fact must be labeled as such. *See* ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 819 (7th Cir. 1987).

permit the children to continue their monthly visits to Munising, Michigan, to visit Patrick's extended family.

¶6 In addition, the court noted that the move itself would be stressful and that Dana, initially at least, "will lack a social support structure." The court found that Dana and her husband have "unrealistic impressions" of what the move would entail. The court was concerned about the "shouting matches" between Dana and her present husband, as well as expert testimony that her husband lacked a complete understanding of the move's effect on the children.

¶7 The court also expressed its concern about Dana's cooperation with placement and indicated that a greater distance between Patrick and the children would exacerbate problems already occurring. For example, the court noted that the children told Patrick "he was a bad dad because he didn't pay enough child support," although he pays $1,475 per month. The court also noted Dana's history of alcohol abuse as an additional factor that led to its decision. While the placement proceedings were pending, Dana "had an OWI" offense.[4] The court observed that:

> Earlier in her life, she went through an inpatient treatment program, but says she received no aftercare instructions. The testimony suggests that it is important for these young boys that Patrick be able to observe whether Dana's alcohol use causes any problems for the children. Patrick's observations would likely be no more than seeing Dana at placement exchanges and listening to whatever the children volunteer. The move would prevent this limited observation.

[4] The briefs do not specify whether Dana was simply charged or actually convicted of operating while under the influence of an intoxicant.

The court noted Dana's allegations that Patrick previously abused alcohol and used marijuana, but concluded there was insufficient evidence he did this anymore. The court ruled that it was in the children's best interests to remain in Chippewa Falls and, if Dana were to move, primary placement would be transferred to Patrick. Dana appeals the order.

1. Legal Standards

¶8 Dana argues the trial court applied erroneous legal standards. The question of whether to permit removal of the children from the state and placement is committed to trial court discretion. *See* ***Bohms v. Bohms***, 144 Wis. 2d 490, 496, 424 N.W.2d 408 (1988). When reviewing a discretionary determination, we look to the record for support of the court's decision. ***Prosser v. Cook***, 185 Wis. 2d 745, 753, 519 N.W.2d 649 (Ct. App. 1994). Its determination will be sustained if the court's decision reflects a reasoning process based upon the facts of record and proper legal standards. ***Bohms***, 144 Wis. 2d at 496. The findings of fact upon which the discretionary decision is made will be sustained unless they are clearly erroneous. WIS. STAT. § 805.17(2). Whether the court applied a correct legal standard presents a question of law subject to independent review. ***Kerkvliet v. Kerkvliet***, 166 Wis. 2d 930, 939, 480 N.W.2d 823 (Ct. App. 1992).

¶9 The record reflects that the court applied the correct legal standards. If a custodial parent contemplates moving out of state with the parties' children and the other parent objects, WIS. STAT. § 767.327 governs.[5] The court proceeded

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[5] WISCONSIN STAT. § 767.327 provides in part:

(continued)

(3) STANDARDS FOR MODIFICATION OR PROHIBITION IF MOVE OR REMOVAL CONTESTED. …

….

(b) 1. If the parents have joint legal custody and substantially equal periods of physical placement with the child, either parent may file a petition, motion or order to show cause for modification of the legal custody or physical placement order. The court may modify an order of legal custody or physical placement if, after considering the factors under sub. (5), the court finds all of the following:

a. Circumstances make it impractical for the parties to continue to have substantially equal periods of physical placement.

b. The modification is in the best interest of the child.

2. Under this paragraph, the burden of proof is on the parent filing the petition, motion or order to show cause.

(c) 1. If the parent proposing the move or removal has sole legal or joint legal custody of the child and the child resides with that parent for the greater period of time or the parents have substantially equal periods of physical placement with the child, as an alternative to the petition, motion or order to show cause under par. (a) or (b), the parent objecting to the move or removal may file a petition, motion or order to show cause for an order prohibiting the move or removal. The court may prohibit the move or removal if, after considering the factors under sub. (5), the court finds that the prohibition is in the best interest of the child.

2. Under this paragraph, the burden of proof is on the parent objecting to the move or removal.

….

(5) FACTORS IN COURT'S DETERMINATION. In making its determination under sub. (3), the court shall consider all of the following factors:

(a) Whether the purpose of the proposed action is reasonable.

(b) The nature and extent of the child's relationship with the other parent and the disruption to that relationship which the proposed action may cause.

(c) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent.

(5m) DISCRETIONARY FACTORS TO CONSIDER. In making a determination under sub. (3), the court may consider the child's adjustment to the home, school, religion and community.

under § 767.327(3)(c), providing that "[t]he court may prohibit the move or removal if, after considering the factors under sub. (5), the court finds that the prohibition is in the best interest of the child." The court considered the reasonableness of the move, *see* subsec. (5)(a), the children's relationship with Patrick and disruption the move would cause, *see* subsec. (5)(b), and the unavailability of alternative arrangements to foster the children's relationship with and provide access to Patrick, *see* subsec. (5)(c). Additionally, the court considered the children's adjustment to the home, *see* subsec. (5m), noting the lack of available support structure and the stress of the proposed move, Dana's inappropriate alcohol use, the shouting matches she engaged in with her husband, her husband's less than complete understanding of the effect the move would have on the children, and the disparaging words the children heard regarding child support from Patrick.

¶10 Nonetheless, Dana contends: "The trial court was clearly too concerned with whether Dana should move with the children, as opposed to applying the correct legal standard of whether the children's best interests were served by a transfer of placement from Dana to Patrick." She argues the trial court "did exactly what the court of appeals held" was improper in ***Kerkvliet***. We are unpersuaded.

¶11 To avoid an unreasonable construction of WIS. STAT. § 767.327, ***Kerkvliet*** rejected a father's claim of error when the court denied his motion for transfer of placement, despite its finding that the mother's proposed move was wrong, disruptive and selfish. ***Kerkvliet***, 166 Wis. 2d at 936. The court determined that the father failed to meet his burden that a transfer of custody was in the children's best interests. ***Id.*** at 938. The court of appeals stated: "[T]here is no hard-and-fast rule or formula which as yet has been defined for determining

what combination of factors will ultimately assure the future welfare of a child who is the product of a broken home." ***Id.*** at 941 (citation omitted). Section 767.327 is but one segment of WIS. STAT. ch. 767 that addresses the best interests of the child as the standard in various custodial inquiries. ***Kerkvliet***, 166 Wis. 2d at 941. Even WIS. STAT. § 767.24, which governs the initial award of custody or placement, "recites a litany of factors which the family court must consider" that are not exhaustive of relevant considerations. ***Kerkvliet***, 166 Wis. 2d at 941. Thus, the trial court in ***Kerkvliet*** was entitled to determine that the mother's abilities as the primary caregiver "were not outweighed by the impact of the move upon the children's relationship" with their father. ***Id.*** at 944.

¶12 Dana claims that here, the trial court erred because it failed to consider a range of factors, including those in WIS. STAT. § 767.24.[6] She states: "The trial court did not address how the children's best interest would be served by placement with Patrick other than to make the conclusory statement that such was the case." The record belies her assertion. The court's observations during the trial and in its written decision incorporate a wide range of factors, including not only those found in WIS. STAT. § 767.327, but also those enumerated in § 767.24.[7]

[6] Dana does not indicate that she made this argument to the trial court. A party who appeals has the burden to establish "by reference to the record, that the issue was raised before the circuit court." ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

[7] While the court did not specifically refer to WIS. STAT. § 767.24, its decision demonstrates the consideration of § 767.24 factors. ***Rottscheit v. Dumler***, 2003 WI 62 ¶11, 262 Wis. 2d 292, 664 N.W.2d 525 (we may review the record to determine whether it discusses a rational basis for court's decision).

¶13 For example, during the trial the court acknowledged that at Dana's request, the guardian ad litem did not meet with the children, observing that the children were too young to contribute to the decision-making process in a significant way. *See* WIS. STAT. § 767.24(5)(b). Also, the court's decision demonstrates it considered the abundant testimony concerning the parents' wishes and their proposals. *See* WIS. STAT. § 767.24(5)(a). The trial testimony in large part concerned the amount and quality of time each parent spent with the child. The court referred to this factor when it found they had substantially equal placement and noted Patrick's involvement in the children's activities and Dana's role as the stay-at-home parent with primary placement. *See* WIS. STAT. § 767.24(5)(c). In addition, the psychologist and the parents testified to the children's adjustment, and it was undisputed that the children were well adjusted to their present home situation, including the current placement arrangement. *See* WIS. STAT. § 767.24(5)(d). The court discussed this factor in context of the proposed move, noting the stress and lack of available support structure, Dana's alcohol use, the shouting matches between Dana and her husband, her husband's incomplete understanding of the effect of the move on the children, and the disparaging words from the children regarding child support.

¶14 Also, a psychologist testified to the children's developmental needs due to their ages, and the court's concern with stability and continuity, as evidenced in its written decision, is consistent with the psychological testimony. *See* WIS. STAT. § 767.24(dm) and (em). The record discloses no significant physical or mental illnesses, thus obviating the need for the court to discuss this factor. *See* WIS. STAT. § 767.24(e). The court did not specifically discuss childcare, but the testimony on this issue was not in dispute. *See* WIS. STAT. § 767.24(f). The children were of school age. If they remained with Dana, she

was available after school. If they remained with Patrick, after-care programs were available at their school. Thus, the record reflects that childcare is available in either placement.

¶15 The court was concerned with and commented at length upon the cooperation and communication between the parties. *See* WIS. STAT. § 767.24(fm). While the parents cooperated and communicated to some extent, it was evident from the court's opinion that this was an area requiring improvement. The court was also concerned with Dana's support and facilitation of the children's relationship with Patrick, noting that the children were privy to her dissatisfaction with the child support order. *See* WIS. STAT. § 767.24(g). There was no evidence of child abuse, and Dana does not argue that spousal abuse was an issue at trial. *See* WIS. STAT. § 767.24(i). The court discussed allegations of alcohol and drug abuse as a factor in its decision. *See* WIS. STAT. § 767.24(j). In addition, the court referred to the psychologist's testimony, demonstrating the weight it placed on this evidence. *See* WIS. STAT. § 727.24(jm). Thus, the record abundantly demonstrates that the court considered a wide range of factors in reaching its determination. The court concluded the children's best interests were served by prohibiting the move under WIS. STAT. § 767.327(3)(c) and transferring primary placement to Patrick if Dana would move out of state, pursuant to § 767.327(3)(b). Because the court applied correct legal standards and articulated its reasoning based upon facts of record, its decision is sustained.

¶16 Nonetheless, citing ***Kerkvliet***, Dana argues: "[T]he only remedy available to the non-custodial parent is to seek a modification of custody or physical placement." ***Kerkvliet*** stated that the statutory scheme in effect at the time bestowed no authority on the court to deny permission to remove the children. *See* ***id.*** at 945-46. Dana acknowledges that the present WIS. STAT.

§ 767.327(3)(c), added after ***Kerkvliet***, authorizes the court in the exercise of its discretion to prohibit the move. Therefore, this argument fails.

2. Unreasonable construction of WIS. STAT. § 767.327

¶17 Next, Dana argues that by applying the incorrect legal standard, the court did not make a complete and rational decision. She claims the court did not apply the relevant facts and focused only on the three factors set forth in WIS. STAT. § 767.327(5). Dana also criticizes the guardian ad litem's recommendation for the same reason. She claims that focusing only on Patrick's rights violated the standards set forth in ***Kerkvliet***. Dana's legal argument essentially recasts the same argument made in the preceding section, which we have rejected.

¶18 Dana also interweaves a factual argument. She claims the trial court erred because it failed to address the psychologist's testimony. With no record citation, Dana states: "This is especially apparent given [the psychologist's] testimony that Dana should be the primary caretaker" and "that he had concerns about Patrick's ability to be the primary caretaker" as well as concerns the children should not be separated from their mother or half-brother.

¶19 We are under no obligation to review arguments that fail to include adequate record citation and may reject the argument on that ground alone. ***Dieck v. Unified Sch. Dist.***, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990). In reviewing the record, however, it is apparent that the trial court accepted the psychologist's testimony. *See* WIS. STAT. § 805.17(2). The psychologist testified that Dana's proposed move was not in the children's best interests. He recommended that she should maintain primary placement if she continued to reside in Chippewa Falls or no farther than Hudson. In addition, when asked about concerns regarding Patrick's parenting ability, the psychologist replied:

> I don't have any immediate concerns that he would be in any way harmful in his care for the children. It is, perhaps, recognizable in the report that I would have some concerns at this point about whether his capability of being the sole provider for the children exceeds the capability of Dana.

¶20 The trial court's determination is consistent with the psychologist's testimony. The court found that the children's best interests were served by remaining in Dana's care in Chippewa Falls. The trial court carefully considered the evidence and explained its reasons for concluding that Dana's abilities as the primary caregiver were outweighed by the disruptive impact of the move on the children's relationship with Patrick, their community and extended family. Because the trial court applied the correct legal standards to facts of record, and articulated a reasonable decision, Dana's claim of error fails.

3. Proof of Patrick's objection

¶21 Next, Dana argues that Patrick did not meet his burden of proof to transfer placement to him. She contends that "Patrick did not present any evidence that it was in the children's best interest to transfer placement." She claims that the psychologist did not fully address the transfer of placement issue because he relied on Dana's statement to him she would not move without her children. Dana further argues that the record fails to support the court's findings that there was no reasonable alternative to prohibiting her move. She claims that "Patrick simply stated he wanted to be involved in their lives on a regular basis" and did not think that would happen if they moved to Bollingbrook, near Chicago, approximately five hours away.

¶22 These arguments essentially mount a broad attack on the weight and credibility of the evidence supporting the court's findings. We set aside findings of fact only if they are clearly erroneous, and we defer to the trial court's

opportunity to judge the witnesses' credibility. WIS. STAT. § 805.17(2). The record supports the trial court's findings of fact.

¶23 The court was entitled to believe the psychologist's testimony that Patrick was an involved father and the move would cause disruption in the children's relationship with him. The court also believed the father's testimony, to the effect that the proposed move would eliminate visits during the week, substantially shorten the alternate weekend visits and essentially prevent his involvement in the children's daily activities. The court was entitled to find that due to the children's ages, email and telephone contact were not acceptable alternatives. The evidence permitted a finding that no alternative existed to prevent this disruption in the children's relationship with Patrick.

¶24 The trial court carefully considered the evidence and explained its reasons for concluding that Dana's abilities as the primary caregiver were outweighed by the disruptive impact of the move on the children's relationship with their father, their community and extended family. The record supports the court's conclusion that should Dana decide to move, a transfer of placement to Patrick was in the children's best interests.

4. Constitutional Violations

¶25 Finally, Dana argues that the court's order violates her rights to substantive and procedural due process. She contends that the court's decision was arbitrary. She claims that she has a constitutional right to move from one state to another, citing ***Attorney General of New York v. Soto-Lopez***, 476 U.S. 898 (1986). She further contends that she has the right to remarry and to the care and custody of her children, citing ***Barstad v. Frazier***, 118 Wis. 2d 549, 556-57, 348 N.W.2d 479 (1984), and ***Boddie v. Connecticut***, 401 U.S. 371 (1971). She

contends that the court's ruling impermissibly restricted her right to remarry. She also interweaves an attack on the guardian ad litem's recommendation as a misinterpretation of the law. Dana limits her challenge to an "as-applied" challenge, with a concession that WIS. STAT. § 767.327 would arguably survive a facial challenge. We reject her arguments.

¶26 At the outset, Dana makes no showing that she raised these issues before the trial court. A party who appeals has the burden to establish "by reference to the record, that the issue was raised before the circuit court." ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). Consequently, they are not preserved for appellate review.

¶27 In addition, Dana's guardian ad litem challenge is not set out as a separate argument and is insufficiently developed. *See* WIS. STAT. RULE 809.19(1); *see also* ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). Further, the record shows that the court did not restrict Dana's right to remarry. Dana has in fact remarried and does not identify any restriction. *See* ***Klatt v. LIRC***, 2003 WI App 197, ¶23-24, 266 Wis. 2d 1038, 669 N.W.2d 752. The order does not dictate whether Dana may remarry. *See* ***id.***, ¶23. Additionally, the court did not deprive Dana of her right to travel or custodial rights as Dana's decision to reside in another community with her husband is a voluntary choice, not a constitutional deprivation. *See* ***id.*** Also, Dana's due process challenge fails because the court's order was not arbitrary, but rather based upon a proper exercise of discretion. We conclude Dana's claim of constitutional violations is without merit.

By the Court.—Order affirmed.

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