COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2005

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. 04-0810 **Cir. Ct. No. 02-FA-349**

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

IN RE THE MARRIAGE OF:

DE ANN NICHOLS,

PETITIONER-APPELLANT,

V.

MONTE NICHOLS,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

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

¶1 CANE, C.J. DeAnn Nichols appeals that portion of a divorce judgment awarding DeAnn and Monte Nichols joint legal custody under a

placement schedule in which primary placement alternates annually.[1] DeAnn also appeals the circuit court's denial of child support. DeAnn argues the court erroneously exercised its discretion when it (1) conditioned granting a pre-hearing adjournment on her agreement that Monte temporarily be awarded primary placement and then imposed a placement schedule that (2) deviated from the court's standard schedule; (3) disregarded the testimony of expert witnesses, the guardian ad litem, and the statutory guidelines set out in WIS. STAT. § 767.24[2]; and (4) reflected a presumption of equal placement contrary to statutory requirements. She argues further that the court erred when it refused to order child support because that decision was based solely on the presumption that, under a placement schedule of alternating years, the parties would share the costs of childrearing "50-50."

¶2 When DeAnn withdrew her request for an adjournment and agreed to move forward with the hearing, she failed to preserve any issue raised by the circuit court's response to her motion.[3] The only questions before us on appeal are thus whether the court erroneously exercised its discretion when it imposed an

[1] The court actually ordered its "standard schedule except that the parent having primary physical placement will change on an annual basis." Under that schedule, one parent would have primary placement from one Labor Day to the next; the other parent would have the children on alternate weekends, from 5:00 p.m. on Fridays to 8:00 p.m. on Saturdays, with a visit on Wednesdays during the weeks in which there was no weekend placement.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3] We are reluctant to reverse a trial court on an issue it never had the opportunity to address. ***Gruber v. Village of N. Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692. DeAnn claims the court forced her to comply with its mandate to avoid subjecting her children "to two dramatic placement changes, one in August and then another in October after school was already underway." Because DeAnn had the option of maintaining her motion for an adjournment and presenting her arguments to the trial court, however, we see no reason why the waiver rule should not be applied.

alternate year placement schedule and when it refused to order child support. We conclude the decision to alternate primary placement on a yearly basis reflects a reasonable application of the law to the particular facts in this case. The court's rationale for deviating from the percentage standard for calculating child support is, by contrast, sufficiently unclear that we cannot be certain it made a proper determination of unfairness under WIS. STAT. § 767.25(1m). The judgment is therefore affirmed in part, reversed in part, and remanded for further proceedings.

Background

¶3 DeAnn and Monte were married in 1995 and had three children together, Deedra, Cole, and Desiree.[4] On July 25, 2002, DeAnn filed for divorce. At that time, both parents lived in the same school district and they decided, as a temporary measure, to move the children between their residences each week. Monte and DeAnn could not agree, however, on a permanent placement schedule so the court appointed a guardian ad litem for the children.

¶4 On June 5, 2003, the guardian ad litem filed his placement recommendation with the court and a final hearing was scheduled for June 13. Monte objected to the recommendation, and requested a custody study. The court granted Monte's request and rescheduled the final hearing for August 20, 2003. On August 7, thirty days after the custody study was to have been provided to DeAnn, Monte's expert submitted his report. On August 12, DeAnn requested an

[4] At the time of the final hearing, Deedra was ten years old, Cole was five years old, and Desiree was three years old.

adjournment for an additional custody study.[5] At a hearing on that motion, the court warned the parties that it had scheduled the final hearing for August 20 so placement could be resolved before school began. The court also said it was highly unlikely it would approve a weekly alternative placement schedule because such an arrangement created too much instability. The court then refused to grant DeAnn's motion for an adjournment unless she agreed to a standard school-weekend schedule[6] with primary placement awarded, until after a rescheduled hearing, to Monte. DeAnn withdrew her motion and the final hearing went forward as scheduled on August 20. The court ordered the final placement schedule described in ¶1. DeAnn now appeals.

Discussion

¶5 Determinations about physical placement in the best interest of the child are committed to the sound discretion of the circuit court. *See* ***Culligan v. Cindric***, 2003 WI App 180, ¶7, 266 Wis. 2d 534, 669 N.W. 2d 175. We will not, therefore, overturn a placement decision if that decision reflects a reasoned application of the law to the facts in the case. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Like decisions about placement, child support determinations will not be set aside in the absence of an erroneous exercise of discretion. *See* ***Thibadeau v. Thibadeau***, 150 Wis. 2d 109, 114-15, 441 N.W. 2d 281 (Ct. App. 1989). While the circuit court has broad discretion in making decisions about placement and child support, its power is still limited to

[5] The guardian ad litem supported DeAnn's motion because Monte's expert, Dr. Paul Caillier, never interviewed the couple's youngest child and because "there's some things [sic] missing here that need to be addressed."

[6] The same schedule described in ¶1 absent the yearly change in primary placement.

that provided by statute. *See* ***Franke v. Franke***, 2004 WI 8, ¶¶80-81, 268 Wis. 2d 360, 674 N.W.2d 832 (child support) and ***Schwantes v. Schwantes***, 121 Wis. 2d 607, 626-30, 360 N.W.2d 69 (Ct. App. 1984) (placement).

¶6 DeAnn argues first that the circuit court erroneously exercised its discretion when it rejected both the placement schedule she requested, which was the court's standard schedule, and the alternating semester schedule Monte proposed. She contends it was unreasonable for the court to deviate from the schedule it ordinarily used in contested placement cases and to substitute, without warning, a schedule in which primary placement changed annually. We disagree.

¶7 WISCONSIN STAT. § 767.24 authorizes circuit courts to make any provisions they deem "just and reasonable" concerning the legal custody and physical placement of minor children subject only to the limitations imposed by the statute. Joint legal custody is presumed to be in the best interests of the child. *See* WIS. STAT. § 767.24(2)(am). There is no parallel presumption about equal placement. *See* ***Keller v. Keller***, 2002 WI App 161, ¶12, 256 Wis. 2d 401, 409, 647 N.W.2d 426. The court is only required to set a schedule that allows the child or children to have "regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent." WIS. STAT. § 767.24(4)(a)2. Nothing in the statute thus limits the court's ability to set a schedule in which primary placement changes each year.

¶8 Under the schedule issued by the court, the Nichols' children will have regular and meaningful physical placement with each parent. The court decided that it was in the best interests of the children to maximize the amount of time they would spend with DeAnn and Monte by giving each parent primary placement in alternating years, from one Labor Day weekend to the next. Facts

on the record suggest that Cole's progress at home and in school had been disrupted by the divorce and the alternate weekly placement schedule. The court also heard evidence that Cole, who had been diagnosed with medical problems, would particularly benefit from stability and a consistent parenting style.[7] The court's decision to set a placement schedule whose primary goal was to generate greater stability was therefore reasonable based on the facts. It was also reasonable for the court to deviate from its standard practice to take the particular needs of one child into consideration—indeed, WIS. STAT. § 767.24(5)(am) requires a court to consider all facts relevant to the best interest of the child when creating a placement schedule.[8]

¶9 DeAnn next argues that the court erred by disregarding lay and expert witnesses, including the guardian ad litem, the parties' wishes, the custody study, and the statutory guidelines when it crafted a placement schedule that deviated from what the court described as its "standard visitation schedule" in contested cases. We are not persuaded. A court must consider all facts relevant to the best interest of the child. *See* WIS. STAT. § 767.24(5)(am). It is also required to consider fifteen enumerated factors, including proposed parenting plans, the child's adjustment to home and school, and the need for regularly occurring and meaningful periods of placement to "provide predictability and stability for the child." *See* WIS. STAT. § 767.24(5)(am).[8] The mere fact that the court's

[7] Both the guardian ad litem and Monte's custody study expressed concern with providing stability for the children, particularly Cole.

[8] A placement decision can be revised after two years; before that time, however, a party must show, by substantial evidence, that modification is necessary because the current conditions are "physically and emotionally harmful to the best interest of the child." WIS. STAT. § 767.325(1)(b).

placement schedule differs from those proposed by the parents, the guardian ad litem and its own standard schedule does not establish that the court failed to do its statutory duty and consider those options.

¶10 DeAnn notes there is no proper exercise of discretion when the court adopts "the position and findings of a party without stating the factors it relied on in deciding to do so." *See* ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 544, 504 N.W.2d 433 (Ct. App. 1993). However, the circuit court here did not adopt the position of either Monte or DeAnn and stated, in general terms, the factors that shaped its reasoning process. The judgment specifically says the court "considered the placement recommendation of Dr. Paul Caillier and determined it would be too disruptive to the children." The court also explained that it deviated from its standard schedule, the schedule requested by DeAnn, only to the extent of rotating primary placement between the parents on a yearly basis.

¶11 The record provides support for this choice. At the hearing, the court recognized the children's interest in having significant contact with both parents and the potentially disruptive effects of being subject to different parenting styles. The court decided the best way to balance those competing interests was "alternating primary physical placement from Labor Day to Labor Day." While the parties might disagree with the balance struck by the court,[9] we cannot

[9] DeAnn identifies a number of facts—about Monte's domestic battery, the domestic arrangements provided for the children at his parent's house, and his methods of discipline—she says the court disregarded without "providing any rational explanation." This argument appears to misunderstand or mischaracterize the relation between the standard of review and WIS. STAT. § 767.24. The statute sets out the factors the court must consider and requires it to consider any other facts relevant to the best interests of the child; but it neither creates a template the court must follow in announcing its decisions nor a presumption that failure to address a factor explicitly equals non-consideration, a failure of discretion.

conclude that the court ignored relevant facts, applied the wrong law, or considered statutorily impermissible factors when exercising its discretion.

¶12 DeAnn also argues the court had to have made a presumption of equal placement to order an annual change in primary physical placement. While DeAnn is correct that WIS. STAT. § 767.24 does not establish a presumption that equal placement is in the best interest of the child, she never claims that the court articulates this presumption, suggesting we look to the court's silence "with regard to the rationale" for alternating primary placement for evidence of error. As we concluded in the previous paragraph, however, the court did provide a reasoned basis for alternating primary placement. We are not required to look behind that rationale for unspoken or erroneous assumptions.

¶13 Finally, DeAnn argues the circuit court erred when it refused to order child support on the grounds that, under its yearly alternate placement schedule, the parents would share expenses over time "50-50." She contends that an order of no support is a deviation from the percentage standard, requiring the circuit court find not that another option is fair, but that the standard is unfair to a party or to the children. We agree.

¶14 According to the statute, the court "shall determine child support payments by using the percentage standard established by the department under s. 49.22(9)," unless it finds[10] "that use of the percentage standard is unfair to the child or to any of the parties" in which case it shall state its "reasons for finding

[10] Neither Monte nor DeAnn explicitly requested the court to modify the percentage standard. We do not address whether the court is authorized to deviate from that standard without such a party request here, however. *See* ***Gross v. Hoffman,*** 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

that use of the percentage standard is unfair to the child or the party." *See* WIS. STAT. §§ 767.25(1j), (1m), (1n). The only discussion of the child support decision occurred when the court made the following statement:

> Now, I could order child—they're both—both these people are making the same amount of money, and for three children is it about 25 percent? … 29 percent. Well, it's even more than what I came up with here, would be $833 a month in child support. But there will be approximately 50-50 over the course of the lifetime of the order in child support, and they're both making the same amount.
>
> Now if that circumstance changes, that is, one parent makes significantly more, there's only a hundred dollars a month that—at this point that separates the incomes of the parties, if I remember, it's 3,300 and something a month and 3,400 and something a month gross, it could be the child support would be appropriate if there is a difference in income with regard to the parties.

The court suggested that, under the placement plan proposed, denying child support placed the parties in the same position they would be in if it had ordered support. That suggestion ignores the fact that one parent could pay all expenses for three children for one year, and, if the alternate placement scheme failed, find himself or herself without any claim against the other parent. More important, whether the parents would be in the same position is irrelevant. Courts have the authority to modify the percentage standard, but they cannot exercise that authority until after they do what the circuit court here failed to do: make a finding that the percentage standard is unfair.

¶15 Before it can make such a finding, the court must first consider fifteen enumerated factors, including the best interest of the child, and any other factors relevant to the particular case. *See* WIS. STAT. § 767.25(1m). Nothing in

the circuit court's statement indicates it considered any of these factors.[11] Although child support decisions are discretionary, that discretion is limited by the clear statutory requirement that the circuit court consider relevant statutory factors before deviating from a percentage standard that it finds unfair. *See, e.g.,* ***Hubert v. Hubert,*** 159 Wis. 2d 803, 815, 465 N.W.2d 252 (Ct. App. 1990). Based on the court's statement, we cannot say the decision to deny child support was a proper exercise of discretion. We therefore reverse that part of the judgment and remand this issue to the circuit court to proceed as required by WIS. STAT. § 767.25.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded. No costs to either party.

Not recommended for publication in the official reports.

[11] There is no indication, in particular, of any concern with how the Nichols children would be affected by the decision not to award child support. Alternating financial responsibility could encourage a variety of practices, including expense stacking and delayed expenditures that would clearly not be in the best interests of the children.