COURT OF APPEALS
DECISION
DATED AND RELEASED

June 25, 1996

NOTICE

Nos. 94-1505, 94-2544 & 94-2882

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

JOHN McCLELLAN,

Petitioner-Appellant,

v.

MARY L. SANTICH, a/k/a
MARY L. McCLELLAN,

Respondent-Respondent.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JOHN G. BARTHOLOMEW and RAYMOND E. GIERINGER, Reserve Judges. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. John McClellan appeals from a judgment granting the annulment of his marriage to Mary Santich. McClellan argues that the trial court erred in: (1) denying his motion for joint custody of his son; (2) denying his motion for modification of the placement of his son; (3) denying him the opportunity to fully cross-examine a psychologist; and (4) ordering him

to pay all the fees of the court appointed guardian ad litem. McClellan also appeals from an order denying his request for a substitution of judge. McClellan further appeals from an order finding him in contempt for failure to pay child support. This issue has not been briefed or argued and we deem it abandoned. ***Reiman Assocs., Inc. v. R/A Advertising, Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981).

McClellan and Santich are the biological parents of John Marcus McClellan III, born on July 19, 1987. According to McClellan, the parties were married three months later on October 12, 1987. Santich states that they were never married. During the next few years, their relationship deteriorated and the parties separated. Santich was awarded sole legal custody of their son. Santich moved to Wisconsin while McClellan remained in Nevada, where they had been living. On May 17, 1990, McClellan petitioned the district court in Nevada for visitation rights with his son. Soon after, McClellan relocated to Wisconsin. On January 3, 1991, the district court in Nevada entered an order fixing McClellan's visitation schedule. On February 1, 1991, McClellan filed the Nevada order with the Milwaukee circuit court. On July 13, 1992, McClellan petitioned for divorce. On October 21, 1992, Santich counterclaimed, seeking an annulment. During a trial on this matter, McClellan filed a motion for a change of custody, seeking joint custody, and to modify the physical placement of his son. After a hearing, the trial court denied both of McClellan's motions. Further, the trial court ordered McClellan to pay the fees of the guardian ad litem appointed to represent the interests of his son. The parties' marriage was later annulled. After the annulment was granted, McClellan continued to file various motions with the trial court, including a motion to remove Judge Raymond E. Gieringer because of what McClellan perceived to be bias on the part of Judge Gieringer. The motion was denied. McClellan then filed a motion for a review of that decision by Chief Judge Patrick Sheedy. The record is unclear as to the disposition of that motion.

First, McClellan argues that the trial court erred in refusing to modify the custodial order. Child custody determinations are committed to the sound discretion of the trial court. ***Gould v. Gould***, 116 Wis.2d 493, 497–498, 342 N.W.2d 426, 429 (1984). We will sustain the trial court's discretionary determination if the court based its decision on the facts of the record, employed a logical rationale, and made its decision in accord with the law. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). Where at least two years

have passed since the initial custody order, the trial court cannot order a custody modification unless it finds that

> two conditions exist: first, the "modification is in the best interest of the child," and, second, there has been a "substantial change of circumstances since the entry of the last order affecting legal custody...." Section 767.325(1)(b)1.a. and b., Stats. When modification is sought after two years, a rebuttable presumption exists that "[c]ontinuing the current allocation of decision making under a legal custody order is in the best interest of the child," and "[c]ontinuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child." Section 767.325(1)(b)2.a. and b., Stats.

Licary v. Licary, 168 Wis.2d 686, 690-691, 484 N.W.2d 371, 373 (Ct. App. 1992).

Our review of the record indicates that the trial court did not erroneously exercise its discretion in denying McClellan's request for joint custody. The trial court concluded that McClellan did not meet the burden of proof required under § 767.325(1), STATS., because he failed to show that the modification was necessary because the current custodial conditions were physically or emotionally harmful to his son. To the contrary, the trial court found that McClellan and Santich would be unable to maintain a joint custody situation "due to [their] adversar[ial] nature." McClellan's argument in support of his request for a custody modification was that he loved his son and wanted to be able to be his son's role model. He was also concerned with the way Santich was dressing his son. According to McClellan, Santich was dressing their son in "girls clothes." The trial court told the parties to respect each other's opinions regarding how the child was clothed and determined that McClellan had not established that the "best interest of the child," § 767.325(1)(b)1, STATS., required modification of the custody order. The trial court did not erroneously exercise its discretion.

McClellan also argues that the trial court erred in refusing to modify the physical placement of his son. The circuit court can change physical placement if that is in the best interest of the child because of a substantial change of circumstances affecting placement. Section 767.325(1)(b)1, STATS. The presumption is that it is in the best interest of a child to continue physical placement with the parent with whom he or she resides most of the time. Section 767.325(1)(b)2.

As with his claim seeking joint custody, McClellan did not provide the trial court with any evidence that a change in physical placement would be in the best interest of his son. The trial court considered the facts, applied the proper legal standards and correctly exercised its discretion in refusing to modify the physical placement order.

McClellan next argues that the trial court erred by limiting his cross-examination of Dr. Marc Ackerman, a psychologist who testified on behalf of Santich during the trial. It is within the trial court's discretion to determine the appropriate scope of cross-examination. ***Peissig v. Wisconsin Gas Co.***, 155 Wis.2d 686, 702, 456 N.W.2d 348, 355 (1990). A reviewing court will not reverse unless it is clear that the trial court erroneously exercised its discretion and that the error complained of affected a substantial right of the party and probably affected the outcome of the trial. ***Id.***

Although the trial court did limit McClellan's cross-examination of Dr. Ackerman, it did so properly. The record indicates that McClellan was given a substantial amount of time to conduct his cross-examination of Dr. Ackerman. McClellan, however, used this time to continually question Dr. Ackerman on irrelevant issues. The trial court's limitation on McClellan's cross-examination of Dr. Ackerman was well within its discretion.

Next, McClellan argues that the trial court erroneously exercised its discretion in ordering him to pay the guardian ad litem fees. Section 767.045(6), STATS., provides that the trial court "shall order either party or both parties to pay all or any part of the compensation of the guardian ad litem...." When determining the allocation of the payment of guardian ad litem fees, a trial court can take into account the parties' actions during the litigation. *See* ***Doer v. Doer***, 189 Wis.2d 112, 126, 525 N.W.2d 745, 750-751 (Ct. App. 1994)

(when ordering husband to pay all guardian ad litem fees, trial court considered husband's insistence on litigating custody and related issues despite substantial evidence contrary to his position). The trial court determined that McClellan "overlitigated this matter" by filing "motions, documents, [and] affidavits" that were "irrelevant and obfuscatory and time-consuming without any real legitimate legal purpose." McClellan argues that the trial court ordered him to pay the guardian ad litem fees without making a determination as to his ability to pay the fees. While an award of attorney's fees usually requires an analysis of one party's need for contribution and the paying party's ability to pay, such an analysis is not necessary when the paying party has overtried the case. ***Ondrasek v. Ondrasek***, 126 Wis.2d 469, 484, 377 N.W.2d 190, 196 (Ct. App. 1985). The record establishes that the trial court properly exercised its discretion.

Finally, McClellan argues that the trial court erroneously denied his request for substitution of judge pursuant to § 801.58(1), STATS., which states in pertinent part: "If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment...." This case was assigned to Judge John G. Bartholomew on December 8, 1993. On July 11, 1994, Judge Gieringer replaced Judge Bartholomew. McClellan states that he never received written notice of Judge Gieringer's assignment. He states that he found out about it only after a discussion he had with a clerk at the courthouse regarding an unrelated matter. Although he does not state when this conversation took place, he filed his request for substitution against Judge Gieringer on July 25, 1994, fourteen days after Judge Gieringer's assignment was made. Judge Gieringer set a hearing on McClellan's request for substitution for August 15, 1994. McClellan, however, did not appear for the hearing and his request for substitution was denied. The record indicates that notice of the August 15 hearing was sent to McClellan. McClellan does not offer any explanation in his brief as to why he did not appear in court for that hearing. In order to preserve his argument on appeal, McClellan was required to appear in court to argue that he did not receive timely notice of Judge Gieringer's proper assignment. Since McClellan failed to do so, his argument is waived. *See* ***State v. Ledger***, 175 Wis.2d 116, 135, 499 N.W.2d 198, 206 (Ct. App. 1993) ("[F]or purposes of trial court proceedings, ... a party must raise and argue an issue with some prominence to allow the trial court to address the issue and make a ruling" before this court will consider it on appeal.). McClellan also argues that Chief Judge Patrick Sheedy erroneously exercised his discretion by affirming the denial of his request for substitution. *See* § 801.58(2), STATS. (chief judge may review rejection by trial court of request for substitution). The record does

not contain an order entered by Chief Judge Sheedy in connection with McClellan's request for substitution filed against Judge Gieringer. We will not, therefore, address this argument. *See* ***Ryde v. Dane County Dept. of Soc. Servs.***, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977) (review is limited to those parts of the record available to the appellate court).

By the Court.—Judgment and orders affirmed.

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