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DISTRICT IV

June 16, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1866 In re the marriage of: Brian Joseph Liebaert v. Jacqueline Kay Liebaert (L.C. #2011FA110)

Before Lundsten, Sherman and Kloppenburg, JJ.

Jacqueline Liebaert appeals a divorce judgment that awarded primary physical placement of Jacqueline and Brian Liebaert's children to Brian and divided the parties' property.[1] Jacqueline argues that the circuit court erred by: (1) modifying the placement schedule by ex parte order; (2) setting a placement schedule without considering the required statutory factors; and (3) failing to divide the parties' property. Based upon our review of the briefs and record,

[1] Because the parties share a surname, we refer to them by their first names for ease of reading.

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[2] We summarily affirm.

Brian and Jacqueline married in 2005, and Brian petitioned for divorce in 2011. The primary issue at trial was physical placement of Brian and Jacqueline's three minor children. On February 22, 2013, the court rendered an oral judgment that granted the divorce and set a placement schedule that awarded primary placement to Brian. The court also valued and divided the parties' property, requiring Brian to make an $818 equalization payment to Jacqueline.

On March 11, 2013, Brian filed a motion and supporting affidavit averring that Jacqueline had refused to return their children as required by the physical placement schedule ordered by the court. The same day, the circuit court entered an order requiring Jacqueline to return the minor children to Brian and suspending Jacqueline's placement until she appeared in court to establish why her placement should be reinstated. On May 20, 2013, the circuit court entered a judgment of divorce, incorporating the terms set forth in its oral ruling as well as the terms of its March 11, 2013 order.

Jacqueline argues that the circuit court erred by entering the March 11, 2013 order suspending Jacqueline's physical placement because the court failed to provide Jacqueline notice and an opportunity to be heard before entering the order. Jacqueline cites WIS. STAT. § 767.451(6) for the proposition that a circuit court may not enter an order modifying physical placement without providing notice to the parents. She cites WIS. STAT. § 767.41(4)(b) for the proposition that a court may suspend placement with one parent only after a hearing establishing

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

that placement with that parent would endanger the children. Jacqueline argues that, under ***Sandy v. Sandy***, 106 Wis. 2d 230, 316 N.W.2d 164 (Ct. App. 1982), an ex parte order may be entered only upon a showing of actual or threatened violence, and that such a showing was not made in this case. She contends that the circuit court improperly modified the physical placement schedule within two years of the divorce absent substantial evidence that the current placement is harmful to the children's best interest, contrary to WIS. STAT. § 767.451(1). Jacqueline contends that Brian should have been required to follow the procedure under WIS. STAT. § 767.471 for seeking to enforce the placement schedule.

Brian responds that this issue is moot. He asserts that, subsequent to the filing of this appeal, the circuit court held a hearing on placement and the parties stipulated to resume the placement schedule as it existed prior to the March 11, 2013 order. Brian asserts that the question of whether the circuit court properly suspended Jacqueline's placement by the March 11, 2013 order will have no effect on the underlying controversy because Jacqueline's placement has now resumed. *See* ***PRN Assocs. LLC v. DOA***, 2009 WI 53, ¶29, 317 Wis. 2d 656, 766 N.W.2d 559 ("An issue is moot when the court concludes that its resolution cannot have any practical effect on the existing controversy.").

Jacqueline replies that placement issues remain unresolved, and that the court's continuing jurisdiction over physical placement does not moot the issue of the improper entry of the March 11, 2013 order. However, Jacqueline does not dispute Brian's assertion that the parties have stipulated to resume the placement schedule as it existed prior to the order suspending Jacqueline's placement. Because that order is no longer in effect by stipulation of the parties, resolving whether the order improperly suspended Jacqueline's placement would have no practical effect on any existing placement disputes. Accordingly, we deem the issue

moot, and we decline to ignore mootness to reach the merits. *See* ***id.*** ("Appellate courts generally decline to reach the merits of an issue that has become moot.").

Jacqueline also contends that, in setting physical placement, the court failed to comply with statutory requirements to explain in writing why its findings as to placement were in the children's best interest and to consider enumerated factors. *See* WIS. STAT. §§ 767.41(6)(a) ("If legal custody or physical placement is contested, the court shall state in writing why its findings relating to legal custody or physical placement are in the best interest of the child."); 767.41(5) (setting forth factors a court shall consider in determining physical placement). We conclude that the circuit court substantially complied with statutory requirements in awarding placement.

First, we reject Jacqueline's contention that the circuit court's decision on physical placement was deficient because it was made orally. In ***Landwehr v. Landwehr***, 2006 WI 64, ¶34, 291 Wis. 2d 49, 715 N.W.2d 180, the supreme court held that a circuit court decision modifying placement substantially complied with a statutory requirement that the court state its reasons in writing because the court incorporated its reasoning from an oral ruling. Here, as in ***Landwehr***, the circuit court incorporated its oral reasoning into its written judgment. Accordingly, the circuit court substantially complied with the statutory writing requirement, and we will not disturb the court's decision on this basis.

Next, we reject Jacqueline's contention that the circuit court failed to properly consider the required statutory factors or the children's best interest as required under WIS. STAT. § 767.41(5). Jacqueline argues that the circuit court improperly relied on the guardian ad litem's recommendation to the exclusion of other statutory factors. Jacqueline asserts that the parties presented evidence at trial relevant to the statutory factors, but that the court did not

acknowledge that information or explain its reasoning or its consideration of the children's best interest. We do not share Jacqueline's view of the record.

At the close of trial, the court stated that the evidence established that both parents were loving parents and that the children needed to know and relate to both parents. The court noted it had taken extensive notes, and that it would consider the evidence presented before issuing its decision. The court noted all three children were "normal" children in good health. In its oral ruling, the court found that both parents are fit to care for the children, and the children's best interest is served by joint legal custody; that the children have lived and attended school in Adams County; that one of the children has experienced difficulties in school related to grades and behavior; and that Brian remains in the marital residence in Adams County while Jacqueline has relocated to Illinois. The court also found that the guardian ad litem recommended primary placement with Brian. In its written decision, the court incorporated the findings it made at its oral ruling, and awarded primary physical placement to Brian.

We review physical placement determinations for an erroneous exercise of discretion. *See* ***Bohms v. Bohms***, 144 Wis. 2d 490, 496, 424 N.W.2d 408 (1988). We see no reason to disturb the court's decision in this case. While the court did not invoke the specific statutory factors or the phrase "best interest," our review of the record as a whole reveals that the circuit court considered the trial evidence, the relevant statutory factors and the children's best interest in awarding physical placement. *See* WIS. STAT. § 767.41(5) (in determining placement, the court must consider the facts relevant to the best interest of the children, and factors including the wishes of the parents and the children's adjustment to home and school and educational needs).

Finally, Jacqueline contends that the circuit court failed to divide the parties' property in the judgment of divorce. However, the judgment of divorce states: "Each party is awarded the personal property and vehicles in their possession except [Jacqueline] is awarded the personal property shown upon Exhibit 8 from trial. [Brian] shall pay [Jacqueline] a property settlement payment of $818.00 within 60 days or February 22, 2013." Thus, Jacqueline is mistaken in her assertion that the court failed to divide the parties' property.[3]

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[3] In her reply brief, Jacqueline asserts that the circuit court erred in its division of property, and that an equal division of property would have required an equalization payment to Jacqueline of $4,152. We generally do not address issues raised for the first time in a reply brief and we see no basis to do so here. While Jacqueline complains the record was supplemented with additional pages of the transcript of the court's oral ruling after Jacqueline filed her initial brief, and that those pages contained the court's explanation of its property division, it remains that the judgment of divorce itself divided the parties' property and ordered the disputed equalization payment. If Jacqueline wished to dispute that part of the judgment, she was obligated to raise that argument in her brief-in-chief.