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DISTRICT II

August 17, 2016

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

2015AP666 In re the marriage of: Yvonne Rae Chentnik v. Zachary Earl Chentnik (L.C. #2013FA240)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Yvonne Rae Chentnik appeals from a judgment of divorce, arguing that she should have been awarded sole custody of the minor child, the circuit court erred in calculating Zachary Earl Chentnik's child support obligation, and the circuit court should have ordered Zachary to pay all or most of her attorney fees. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Yvonne and Zachary married each other for a second time in 2006, and a minor child, B.C., was born in 2009. During the second marriage, Zachary was convicted of a crime of domestic abuse against Yvonne. The parties' second divorce was commenced in 2013 and following a trial, the court awarded the parties joint legal custody of B.C., with primary physical placement to Yvonne. In determining custody, the trial court found that Zachary engaged in an act of domestic abuse such that pursuant to WIS. STAT. § 767.41(2)(d)1., there was a rebuttable presumption that an award of joint or sole legal custody to Zachary would be "detrimental to the child and contrary to the best interest of the child." The court determined the presumption was rebutted based on evidence that Zachary "successfully completed treatment for batterers provided through a certified treatment program or by a certified treatment provider", *see* § 767.41(2)(d)1.a., and that an award of joint legal custody was in B.C.'s best interest, *see* § 767.41(2)(d)1.b.

Yvonne asserts that the court erroneously determined that Zachary rebutted the statutory presumption against joint custody. We disagree. As to the first prong, there was evidence in the record that Zachary completed a sixteen-week domestic violence program run by Ricky Person. The circuit court was informed that Mr. Person is employed by the Department of Corrections and is a certified instructor. Based on its independent knowledge of Mr. Person and the information and evidence of record, the circuit court found that Zachary's completed domestic violence program and its instructor were certified within the meaning of WIS. STAT. § 767.41(2)(d)1.a. We see no error.

We also reject Yvonne's contention that the circuit court failed to consider the statutory best interest factors under WIS. STAT. § 767.41(5)(am). *See* § 767.41(2)(d)1.b. On the first day of trial, the circuit court went through the statutory factors with the custody study evaluator and

the guardian ad litem. As to custody, the GAL stated it was a hard call but that on balance, she recommended "sole custody at this point" to Yvonne:

> So, again, this is a tough call for me because I do think [B.C.] would benefit from the involvement of both parents long term, and both parents should be involved in decision making for her, but I see … two bars to that. And the first one being I don't know about that program [and whether it is certified], and the second being I don't think they cooperate at all; so I don't know how they could work together.

The circuit court then went through and made its own findings concerning the statutory best interest factors. The circuit court adopted the GAL's placement recommendations but deferred its decision on custody pending receipt of further information on Zachary's treatment program and provider. Acknowledging the parties' communication issues, the circuit court ordered that they participate in the Child's Best Interest co-parenting program and that Zachary pay for the sessions. When court resumed the next day, the circuit court referred to its prior analysis of the WIS. STAT. § 767.41(5)(am) factors, restated that the custody matter was a close call given the parents' lack of communication, but determined that joint custody was in the child's best interest. Child custody and placement determinations are committed to the sound discretion of the circuit court. ***Gould v. Gould***, 116 Wis. 2d 493, 497, 342 N.W.2d 426 (1984). The circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987).

The circuit court adopted Yvonne's proposed property division, and ordered Zachary to pay maintenance in the monthly amount of $941.67 for four years, and child support in the amount of $272 per week. Yvonne argues that the circuit court determined child support by

imputing a "fictitious" income to Zachary. This mischaracterizes the record. Though Zachary grossed more than $100,000 annually in tax years 2010 through 2012, he had been working more that seventy hours per week in an ultimately unsuccessful attempt to avoid another bankruptcy filing. Zachary was subsequently injured and testified he could no longer reasonably work seventy hours per week. Evidence was presented that at the time of trial, Zachary was actually earning $1600 per week. The calculation of child support lies within the circuit court's discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis.2d 426, 663 N.W.2d 789. The circuit court determined that a seventy-hour work-week was unreasonable in light of the circumstances, including Zachary's placement schedule, and set child support at seventeen percent of his present income. The circuit court's finding that Zachary was earning $1600 per week (or, $83,200 annually) is not clearly erroneous.[2]

Finally, we conclude that the circuit court properly exercised its discretion in ordering Zachary to contribute $500 to Yvonne's attorney fees. A circuit court has broad authority to award attorney fees in a family action based upon consideration of each party's need and ability to pay under WIS. STAT. § 767.241, or upon a finding of overtrial, *see* ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 483-84, 377 N.W.2d 190 (Ct. App. 1985). The circuit court declined to order a larger contribution based on the parties' financial resources, explaining that their income disparity was accounted for in its orders concerning property division and maintenance. The circuit court further found that there was insufficient evidence to award attorney fees on the

[2] Similarly, we reject Yvonne's argument that the circuit court erred by not including as part of Zachary's income any potential rental income from an Ironwood Michigan property. The circuit court ordered the property to be sold and the proceeds divided equally between the parties. Zachary was ordered to pay any outstanding mortgage pending the sale.

theory that Zachary engaged in overtrial. *See* ***Zhang v. Yu***, 2001 WI App 267, ¶¶11-12, 248 Wis. 2d 913, 637 N.W.2d 754 (whether overtrial occurred is a question of historic fact to be determined by the circuit court; even if the circuit court determines that overtrial has occurred, the decision whether to award attorney fees is discretionary). The circuit court examined the relevant facts, applied a proper standard of law, and reached a demonstrably reasonable conclusion with which we will not interfere. *See* ***Liddle***, 140 Wis. 2d at 136.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals