COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0334

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

IN RE THE PATERNITY OF ASHLEY L. D.:

CONNIE L. J.,

PETITIONER-APPELLANT,

V.

MICHAEL D.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed*.

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

¶1 PER CURIAM. Connie L.J. appeals an order transferring primary physical placement of her daughter, Ashley, to her father Michael D. Connie argues that the circuit court erroneously determined that (1) the evidence demonstrates a substantial change in circumstances since the previous order, and

(2) a change of placement is in Ashley's best interest. Because the record reflects a reasonable exercise of discretion, we affirm the order.

Background

¶2 In 1992, a paternity judgment determined that Michael was the father of Ashley, born July 14, 1991. Michael was not married to Ashley's mother, Connie, but resided with them until 1993. After they separated, Connie retained legal and physical custody of Ashley, subject to reasonable visits with Michael.

¶3 In 1994, Connie was suffering from depression and stress while caring for Ashley and Connie's handicapped then sixteen-year-old son. Connie slapped and injured him, resulting in a conviction and probation for child abuse. Connie's therapist testified at trial that Connie has made significant progress since that time.

¶4 As a result of the child abuse incident, however, temporary custody of Ashley was transferred to Michael from February to April. In May, when Ashley was returned to her mother's care, the paternity judgment was modified to schedule periods of physical placement with Michael. The schedule included overnights and three weeks of vacation.

¶5 In 1997, Michael married. He has a step-son, age eleven, and a daughter, age seven, with his wife, Vicki. The trial court found that after Michael and Vicki married, the communication between Connie and Michael further deteriorated.

¶6 In the year 2000, Michael brought a motion, pursuant to WIS. STAT. § 767.325, to modify the judgment to award him primary physical placement. In a

January 2001 order, following the appointment of a guardian ad litem and an evidentiary hearing, the trial court transferred primary placement to Michael. Connie appeals the order.

Legal Standards

¶7 Whether to modify a placement or custody order is directed to the trial court's discretion. ***Hughes v. Hughes***, 223 Wis. 2d 111, 119, 588 N.W.2d 346 (Ct. App. 1998). We affirm a court's discretionary determination when the court applies the correct legal standard to the facts of record and reaches a reasonable result. ***Id.*** at 120. Our task as the reviewing court is to search the record for reasons to sustain the trial court's exercise of discretion. ***Id.***

¶8 Because more than two years had elapsed from the previous custody order, WIS. STAT. § 767.325 provides for revision of legal custody and physical placement orders upon a showing of a substantial change in circumstances.[1] In

[1] WISCONSIN STAT. § 767.325(1)(b) provides:

> [U]pon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:
>
> a. The modification is in the best interest of the child.
>
> b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.
>
> 2. With respect to subd. 1., there is a rebuttable presumption that:
>
> a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.

(continued)

addition, the modification must be in the child's best interest. ***Id.*** The moving party must overcome the legal presumption that continuing the child's current placement is in her best interest. WISCONSIN STAT. § 767.325(1)(b)2b.

¶9 To consider whether there is a "substantial change in circumstances," the trial court must focus on the facts. "It compares the facts then and now. It requires that the facts on which the prior order was based differ from the present facts, and the difference is enough to justify the court's considering whether to modify the order." ***Licary v. Licary***, 168 Wis. 2d 686, 692, 484 N.W.2d 371 (Ct. App. 1992).

¶10 The "before" and "after" circumstances, and whether a change has occurred, are facts that we review under the clearly erroneous standard. ***Harris v. Harris***, 141 Wis. 2d 569, 574, 415 N.W.2d 586 (Ct. App. 1987). The trial court is the ultimate arbiter of the credibility of witnesses. "When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983). Whether a change is substantial is a legal standard. ***Harris***, 141 Wis. 2d at 574. We defer to the trial court's conclusion that a change in circumstances is substantial, but we are not bound. *See* ***id.*** at 574-75.

> b. Continuing 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.
>
> 3. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under subd. 1.

¶11 Once the court has found a substantial change in circumstances, it must determine whether a change of placement is in the child's best interest.[2] WISCONSIN STAT. § 767.24(5) requires that the court consider the child's best interests, reports of professionals and several enumerated factors.[3] These factors

[2] WISCONSIN STAT. § 767.325, revision of legal custody and physical placement orders, provides in part: "**(5m)** FACTORS TO CONSIDER. In all actions to modify legal custody or physical placement orders, the court shall consider the factors under s. 767.24(5) and shall make its determination in a manner consistent with s. 767.24."

[3] WISCONSIN STAT. § 767.24(5) provides:

> FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS. In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian. The court shall consider the following factors in making its determination:
>
> (a) The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
>
> (b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
>
> (c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
>
> (cm) The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.
>
> (d) The child's adjustment to the home, school, religion and community.
>
> (dm) The age of the child and the child's developmental and educational needs at different ages.

(continued)

include the parents' wishes, the child's interaction with parents and siblings, the child's adjustment to surroundings, and other factors the court determines are relevant to the individual case. ***Id.*** In performing this discretionary function, giving consideration to various factors involves a weighing and balancing operation, but the weight to be given a particular factor in a particular case is for

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> (e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.
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> (em) The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.
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> (f) The availability of public or private child care services.
>
> (fm) The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.
>
> (g) Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.
>
> (h) Whether there is evidence that a party engaged in abuse, as defined in s. 813.122 (1)(a), of the child, as defined in s. 48.02 (2).
>
> (i) Whether there is evidence of interspousal battery as described under s. 94019 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1)(a).
>
> (j) Whether either party has or had a significant problem with alcohol or drug abuse.
>
> (jm) The reports of appropriate professionals if admitted into evidence.
>
> (k) Such other factors as the court may in each individual case determine to be relevant.

the trial court, not the appellate court to determine. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

Discussion

1. Substantial change in circumstances

¶12 In this case, the evidence supports the trial court's finding that circumstances have substantially changed since the previous order. The trial court was particularly troubled by Connie's arrests for various offenses. In 1996, Connie was arrested and convicted of shoplifting. In 1997, 1999 and 2000, Connie was arrested for driving while intoxicated. While one of the arrests was reduced to careless driving, the other two resulted in convictions for driving while intoxicated.[4] Connie's driving privileges were revoked, and she was required to spend ten days in jail.

¶13 The court noted that Connie's poor judgment was not limited to law violations. In 1997, Connie was involved in an affair with a married man, whose wife was a teacher at Ashley's school. Ashley recognized the man when she saw a picture of him on a teacher's desk and identified him as her mother's boyfriend. In 1998, Connie was involved with an unstable man who eventually broke into her home, held her against her will and threatened her with a cigarette lighter.

¶14 The court stated: "I see a course of conduct, whereas in 1994 I don't think there was any course of conduct that existed for the court to look at." The record supports the court's finding. While there was evidence of some poor

[4] Although in the year 2000 Connie was also charged with marijuana possession, that charge was ultimately dismissed.

judgment on Connie's part at the time of the 1994 order, there was not the subsequent pattern of arrests, alcohol abuse and harmful relationships. The court's finding that the evidence shows a substantial change of circumstances is not erroneous.

¶15 Connie points to evidence that she is not significantly chemically dependent. This argument misses the point. As the court observed, if Connie were not chemically dependent, then she must have voluntarily chosen to use alcohol and drive. At any rate, it is the trial court's function, not this court's, to weigh the evidence and to resolve conflicts in the testimony. WIS. STAT. § 805.17(2). The evidence that Connie was convicted of three alcohol-related traffic violations between 1997 and 2000 supports the trial court's determination that the pattern of inappropriate alcohol use showed a substantial departure from the circumstances existing in 1994.

¶16 Connie further challenges the court's consideration of Michael's marital status, and its observation that Ashley is now in third grade at school. She complains that marital status is not a valid consideration under WIS. STAT. §767.325(1)(b)3: "A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under subd. 1." She claims that Ashley's schooling is also an insufficient basis, because Ashley has been in school for over four years.

¶17 Connie's argument is unpersuasive. Here, the court considered not only Michael's marital status and Ashley's schooling, but also changes in Connie's lifestyle. Because a variety of factors support the court's finding of a substantial change of circumstances, we are convinced that its reference to marital status and schooling fails to demonstrate reversible error.

2. Best interest

¶18 Next, Connie argues that the court erroneously determined that a transfer of custody is in Ashley's best interest. Connie relies on ***Gould v. Gould***, 116 Wis. 2d 493, 342 N.W.2d 426 (1984), that held that the circuit court erred when it transferred custody because of the mother's conduct without finding any connection between that conduct and "any present demonstrable harm to the child's best interest." ***Id.*** at 503. Connie contends that Ashley would not have known about her arrests or poor relationships unless someone would have told her and, therefore, it would not harm her.

¶19 It is true that Ashley was not in the car during the times Connie was arrested. Nonetheless, the court was entitled to find that driving while intoxicated demonstrated a disregard for the child's best interest. Intoxication itself would have impaired Connie's functioning as a parent, endangered her own welfare and presented a poor role model.[5] The court concluded that Connie evinced a course of conduct showing a lack of parental responsibility.[6]

¶20 Also, the trial court addressed Connie's argument that what Ashley did not know about Connie's activities would not hurt her:

[5] The court stated: "You want your child to grow up to abuse their children? You want your child to grow up to drink and drive? That's the role model you provided."

[6] The court found: "And I am not sure the mother has really taken responsibility, because we have a continuous course of conduct."

> You just can't pretend this doesn't exist any more.
>
> Now how do you explain all these things? [Y]ou have to lie to your child. You have got a choice, either you have them hear about it by somebody else, lie about it, or be forthright. And now you have to be forthright about it. And that's not necessarily good. But why are you in that dilemma of having to either tell the child something she shouldn't have to hear, or tell them a lie? Why are you in a dilemma? Your behavior. See to some extent, you say [Michael] is disclosing, disclosing. If it didn't happen there wouldn't be anything to disclose.

¶21 The trial court's reasoning is sound. The court pointed out that on the one hand, hiding a parent's behavior from a child is detrimental. On the other hand, the disclosure of information may also be detrimental. The court reasoned that the problem arises not from the disclosure, but rather from the behavior itself and lying about it.

¶22 Connie complains that the court failed to consider the appropriate factors set out in WIS. STAT. § 767.24(5). We disagree. The court noted Ashley's age, her relationship with each parent, step-parent and step-siblings, as well as her adjustment to home, community and school. While the court acknowledged that Connie has "done some significant nurturing" of Ashley, it concluded that Connie's five arrests and choices in male relationships showed that she was a poor role model for her daughter. That Connie spent ten days in jail and lost her driving privileges indicated that Ashley's home life lacked stability and supervision.

¶23 The trial court noted that taking Ashley from her home and school district will cause disruption, but concluded, on balance, that the transfer of placement will result in greater stability. The court observed that no one has made any complaints about Michael. Instead, evidence showed he helped Connie care for her first child from a prior relationship, "a child with significant disabilities.

No parent complaints. Did that willingly, voluntarily." The court noted that he helps his current wife with her first child, and adopted another. "That's a tremendous thing to do, a tremendous activity. … Now those are all positive things. [W]hen you are looking for a role model I would think that would certainly be a pretty decent role model." The court got the "impression that [Michael and Vicki] do things with their kids. … And that's a real priority."

¶24 The court found that Michael was not malicious when he spoke to his daughter about not being in a car when the driver has been drinking, or when he warned her of Connie's unstable male friend. "It was my sense listening to [Michael] that [he] was not malicious ... it was an error of judgment, one that was generally motivated by concern for his daughter." The court considered appropriate factors.

¶25 Connie further argues that she is involved in many activities with Ashley, that Ashley prefers to live with her, and that a move will disrupt Ashley's adjustment to home, school and friends. Connie's argument casts the evidence in the light most favorable to herself and ignores evidence favorable to Michael. In doing so, she essentially asks this court to perform the discretionary functions of the trial court. Under our scope of review, we are prohibited from weighing the evidence and factors to determine custody. ***Hughes***, 223 Wis. 2d at 128. Because the court considered appropriate factors and reached a reasoned result, we do not overturn its exercise of discretion.

¶26 Connie also claims that Ashley's father and his wife smoke in the presence of Ashley, who has had a series of respiratory problems and cannot be exposed to second hand smoke. The court, as the ultimate arbiter of credibility, was entitled to believe Michael, who testified that he avoids exposing Ashley to

smoke by smoking in his bedroom with the door shut, a window open and an air filter on.

¶27 Additionally, Connie contends that the trial court erred by failing to order a custody study pursuant to WIS. STAT. § 767.11(14)(a). She concedes that neither party requested a custody study. We conclude that Connie's argument is without merit. Generally, we will not decide issues that have not first been raised in the trial court. ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). There is no reason that this court should take a rare departure from this rule because Connie essentially complains that the trial court did not consider a request not before it. It is self-evident that the trial court could not err by failing to address an issue that was not advanced. A party must raise an issue with some prominence to allow the court to address the issue and make a ruling. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984). Connie's failure to do so constitutes abandonment of the issue in the trial court. *See* ***Zeller v. Northrup King Co.***, 125 Wis. 2d 31, 35, 370 N.W.2d 809 (Ct. App. 1985).

¶28 To reverse a discretionary decision, an appellate court must find either that the circuit court has not exercised discretion or that it has exercised discretion on the basis of an error of law or irrelevant or impermissible factors. ***Barstad v. Frazier***, 118 Wis. 2d 549, 554, 348 N.W.2d 479 (1984). Here, the record demonstrates that the court reached a rational result based upon consideration of appropriate factors. Accordingly, we do not overturn its decision to modify Ashley's placement.

By the Court.—Order affirmed.

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