

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 27, 2007**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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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. 2006AP1921**

**Cir. Ct. No. 2004FA703**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN THE INTEREST OF AZARIAH BLU HOFFMAN:**

**JAYME R. HOFFMAN,**

**PETITIONER-RESPONDENT,**

**V.**

**SARAH R. PRINCE P/K/A SARAH SCHULZ,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Kenosha County:  
CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Sarah R. Prince has appealed from an order awarding legal custody of her three-year-old daughter, Azariah Blu Hoffman, to

Jacquelyn Hoffman, who is the mother of Azariah's father, Jayme R. Hoffman.<sup>1</sup> The order awarded primary physical placement of Azariah to Jayme, and established a schedule for placement with Sarah.<sup>2</sup> The order provided that placement with Sarah would be supervised until such time as Sarah was regularly participating in psychotherapy approved by the guardian ad litem and cooperating with all treatment recommendations. We affirm the trial court's order.

¶2 Custody and placement determinations involve the exercise of discretion by the trial court. See *Keller v. Keller*, 2002 WI App 161, ¶6, 256 Wis.2d 401, 647 N.W.2d 426. This court will affirm the trial court's discretionary determination if it applied the correct legal standard to the facts of record and reached a reasonable result. *Id.* The trial court's findings of fact will be disturbed only if they are clearly erroneous. See *Green v. Hahn*, 2004 WI App 214, ¶9, 277 Wis. 2d 473, 689 N.W.2d 657. This includes its findings as to psychological factors. *Wiederholt v. Fischer*, 169 Wis. 2d 524, 530-31, 485 N.W.2d 442 (Ct. App. 1992).

¶3 Sarah contends that the trial court erroneously exercised its discretion by determining that Azariah was a child in need of protection or services and denying her motion for sole legal custody. She also contends that the trial court erroneously exercised its discretion by awarding unequal physical placement.

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<sup>1</sup> Azariah is a nonmarital child. This action was commenced when Jayme filed a petition to determine paternity and establish custody and placement.

<sup>2</sup> As acknowledged in Sarah's brief, with the exception of holiday and vacation periods, she has physical placement of Azariah for five days out of every fourteen-day period.

¶4 We conclude that the trial court acted within the scope of its discretion in both its custody and placement awards. Subject to additional factors set forth in WIS. STAT. § 767.41(2) (2005-06),<sup>3</sup> legal custody must be awarded based upon the best interest of the child. Sec. 767.41(2)(a). Award of custody to a relative is permissible under § 767.41(3)(a) if it is in the interest of the child and the court finds that neither parent is fit and proper to have the care and custody of the child.

¶5 The trial court awarded legal custody to Jayme's mother as recommended by the guardian ad litem after determining that neither Sarah nor Jayme were fit and proper to have legal custody of Azariah. The trial court found that Jayme was not fit and proper to be Azariah's joint or sole custodian because there was a restraining order for domestic abuse in effect against him, and the parties were therefore incapable of speaking to each other. While acknowledging that Jayme was in a certified treatment program for domestic abuse, it noted that he had not yet completed the program and that he, therefore, could not appropriately be made a joint or sole custodian of Azariah.

¶6 While concluding that neither joint legal custody nor sole custody by Jayme was appropriate, the trial court also found that Sarah was not fit and proper to have sole legal custody of Azariah. In making this decision, the trial court made findings of fact that are not clearly erroneous. It also analyzed the factors relevant to a custody award and thoroughly explained its reasoning.

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<sup>3</sup> All references to the Wisconsin Statutes are to the 2005-06 version.

¶7 In determining that Sarah was not a fit and proper person to have sole legal custody of Azariah, the trial court noted that she had lived a nomadic life in the couple of years preceding the custody trial and had a poor and unstable employment history. It also found that she engaged in “incredible” decision making. Although we will not detail all of the testimony presented regarding Sarah’s decisions and conduct, we conclude that the trial court’s findings regarding the erratic nature of her decision making is supported by the evidence in the record. This includes evidence of multiple moves in the three years after Azariah’s October 2002 birth, including moving with Azariah in and out of Jayme’s home in 2003, taking Azariah and staying with a family she knew only slightly in the summer of 2003, returning to Jayme, then leaving Jayme’s residence and moving into the home of the Prince family in December 2003, having first met Michelle Prince at manicure school in August 2003. The Princes testified that they financially supported Sarah and Azariah, but ultimately told Sarah to move out because of problems they experienced with her, including lying, taking their car while having no license, failing to follow through on job training, and failing to follow house rules. Michelle Prince also testified regarding deficiencies in Sarah’s care of Azariah. In addition, the record indicates that shortly after moving in with the Princes, Sarah commenced an intimate relationship with Michael Prince’s son, Christopher, including sharing her and Azariah’s room with him.

¶8 Sarah moved out of the Princes’ home in May 2004 and married Christopher Prince in June 2004. In October 2004, Sarah moved back with Jayme, but left again in January 2005, staying at various times at a women’s shelter, her sister’s home, and eventually again with Christopher in Racine.

¶9 Temporary primary placement of Azariah was awarded to Jayme and enforced by court order in January and February 2005, with Sarah being granted supervised visitation. Between January 2005 and trial in February 2006, Sarah also obtained a domestic abuse restraining order against Jayme and alleged that he committed extreme acts of sexual and physical abuse, leading to the filing of multiple criminal charges against him and a petition for a child abuse restraining order.<sup>4</sup> However, Sarah dismissed the child abuse petition before hearing, and the prosecutor dismissed the criminal charges.

¶10 In its decision, the trial court found that there was absolutely no evidence that Jayme engaged in any abuse of Azariah. It also found credible the testimony of Dr. Marilyn Befera, determining that Sarah had significant underlying psychological problems and posed a risk to the emotional well-being of Azariah. While we will not detail the findings and conclusions of Dr. Befera, we note that the determination of the credibility of witnesses, including expert witnesses, is for the trial court, and the trial court was entitled to find that Dr. Befera's testimony and conclusions were more credible than the expert evidence submitted by Sarah. *See Wiederholt*, 169 Wis. 2d at 533. The trial court was therefore entitled to rely on Dr. Befera's opinion that Sarah suffered from an

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<sup>4</sup> Copies of the petition for a child abuse restraining order and the affidavit filed by Sarah in support of the petition are included in the appendix to Jayme's brief. In her reply brief, Sarah asks that this court disregard these materials on the ground that they are not part of the record on appeal. We find it unnecessary to determine whether these materials are in the record and properly included in Jayme's appendix. The allegations made by Sarah were discussed in general in the testimony and psychological reports and other parts of the record. The details in the materials attached to Jayme's appendix need not and have not been relied on by this court in affirming the trial court.

adjustment and personality disorder that interfered with effective functioning in her life, necessitating psychological treatment.<sup>5</sup>

¶11 In addition to finding that Sarah posed a risk of emotional harm to Azariah, the trial court found that if legal custody was awarded solely to her without restrictions, she would disrupt Azariah's life by moving her to Racine from Jayme's home in Kenosha, which had provided a stable base for Azariah. The trial court also expressed concern that sole legal custody could be used as a weapon by Sarah in her relationship with Jayme. Based upon these factors and as recommended by the guardian ad litem, it therefore denied Sarah's request for sole legal custody and ordered that custody be awarded to Jayme's mother, who had lived with Jayme and Azariah in Jayme's home during the fourteen-month period leading up to the trial and had been the court-ordered supervisor of Jayme's placement. Because the trial court's exercise of discretion in awarding legal custody to Jayme's mother, rather than sole custody to Sarah, is amply supported by the facts of record and the trial court's findings of fact, the custody decision will not be disturbed.

¶12 The trial court's decision to follow the recommendation of the guardian ad litem and award primary physical placement to Jayme with substantial secondary placement to Sarah is also supported by the record. The trial court analyzed the factors relevant to this placement decision, as set forth in WIS. STAT. § 767.41(5). It noted that Azariah was attached to both parents and doing well,

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<sup>5</sup> Dr. Befera also recommended that Sarah have supervised visitation with Azariah. The trial court ordered supervised visitation, but only until Sarah was regularly attending psychotherapy approved by the guardian ad litem and cooperating with all treatment recommendations.

and that she needed attention from both parents, including more meaningful periods of placement with Sarah than she had under the temporary orders. While acknowledging that both parents had the ability to cause emotional problems for Azariah by badmouthing the other parent, it also found that Jayme provided a more stable environment for Azariah, noting that he had a home and was not planning on moving, and would thus continue to provide Azariah with a stable home base in Kenosha.

¶13 The trial court also considered that Jayme was steadily employed, a fact supported by the record. In addition to finding no evidence that Jayme had ever engaged in abuse of Azariah, it considered that Jayme was participating in a domestic abuse treatment program and found that he did not pose a physical threat to Azariah. This finding is supported by the testimony of Dr. Befera, who recommended primary placement with Jayme and opined to a reasonable degree of psychological certainty that Jayme had a personality profile within normal limits, was not a danger to himself or others, and would be an appropriate individual to parent a child. Testimony that Jayme was a caring and capable father was also provided by Patricia Busse, who had been a close friend of both Sarah and Jayme.

¶14 While the trial court found that Sarah, like Jayme, posed no physical threat to Azariah, it reiterated that it found credible Dr. Befera's conclusions that Sarah constituted a risk to Azariah's emotional well-being and needed psychological treatment. It therefore awarded primary physical placement to Jayme and substantial secondary placement to Sarah, which would be supervised only until she was participating in psychological treatment. Based upon the trial court's findings and because it considered all appropriate factors under WIS. STAT. § 767.41(5), no basis exists to conclude that the trial court erroneously exercised

its discretion by awarding primary placement to Jayme and denying equal placement to Sarah.

¶15 Sarah's final argument is that the trial court acted in violation of the law as set forth in *Koeller v. Koeller*, 195 Wis. 2d 660, 536 N.W.2d 216 (Ct. App. 1995), by ruling that Jayme would be entitled to sole custody and primary placement when he completed his domestic abuse treatment program. In *Koeller*, a mother who was suffering from terminal cancer and whose ex-spouse suffered from mental illness moved the trial court to revise a divorce judgment to grant custody to her sister in the event of her incapacity or death. *Id.* at 661. The trial court granted the prospective custody award. *Id.* at 662. This court reversed the trial court's award on the ground that the law does not authorize a future change in custody based on circumstances that might or might not exist when the order is to take effect. *Id.* at 668.

¶16 The trial court did not prospectively award sole custody and primary placement to Jayme. While it indicated that Jayme would be the appropriate individual to have sole legal custody when he successfully completed the domestic abuse treatment program, it did not order that Jayme would be sole legal custodian when he completed the program.<sup>6</sup> Jayme will need to move the trial court for sole

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<sup>6</sup> In her brief, Sarah also argues that the trial court erred by failing to state on the record why the presumption against awarding custody to a domestic abuser was rebutted. However, the trial court did not award legal custody to Jayme. We therefore need address this issue no further.



legal custody at that time, and it might or might not be awarded. A prospective custody award in violation of *Koeller* therefore does not exist.<sup>7</sup>

*By the Court.*—Order affirmed.

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

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<sup>7</sup> As a final matter, we note that in her reply brief, Sarah argues that the statement of facts in Jayme’s respondent’s brief constitutes an attempt to retry the issues before this court. In fact, it is Sarah who seeks to “retry” the case by asking this court to disturb the trial court’s credibility determinations and factual findings. In contrast, Jayme’s recitation of the evidence is a proper means of demonstrating that the trial court’s findings of fact and exercise of discretion are supported by the record.

