COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2818 **Cir. Ct. No. 2004FA958**

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

IN RE THE MARRIAGE OF:

JENNIFER L. DEVORE P/K/A JENNIFER L. BENTRUP,

PETITIONER-RESPONDENT,

V.

RICK MARTIN BENTRUP, JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Rick Bentrup, Jr., appeals from an order terminating a shared placement arrangement and awarding to his former wife, n/k/a Jennifer Devore, primary placement of Rick's and Jennifer's five-year-old daughter. We conclude that the altered arrangement represents a proper exercise of the trial court's discretion. We affirm.

¶2 Rick and Jennifer divorced in 2005 when their daughter, Madison, was two years old. The court awarded the parents shared placement on alternating weeks. Since Rick lives in Oconomowoc and Jennifer lives in Pleasant Prairie, shared placement became unworkable once Madison started kindergarten. Both parties moved for primary placement. In August 2008, the court entered a temporary order awarding primary placement to Rick, who enrolled Madison in the Oconomowoc school district. Jennifer by this time had remarried a man with two daughters, Emma, ten, and Annie, seven. Jennifer wanted to enroll Madison at Southport Elementary, the Kenosha Unified School District school Emma and Annie attended. At the end of the bench trial in September 2008, the guardian ad litem (GAL) recommended that the original shared placement arrangement be reinstated. The court reversed the temporary order, however, and gave primary placement to Jennifer. Rick appeals.

¶3 Rick contends the trial court erroneously exercised its discretion in terminating the shared placement arrangement. He argues that the court gave undue weight to the presence of Madison's two stepsisters and to Jennifer's volunteer activities at Southport. He also asserts the court gave too little weight to Jennifer's evening work schedule and to the GAL's recommendation that shared placement continue. We are not persuaded that any of these points, considered alone or cumulatively, amount to a misuse of discretion.

¶4 If circumstances make it impractical for the parties to continue to have substantially equal physical placement, the court may modify the order if it is in the best interest of the child. WIS. STAT. § 767.451(2)(a) (2007-08).[1] Determining what course of action is in a child's best interests is a matter within the trial court's discretion and we may not substitute our judgment for the trial court's properly exercised discretion. ***Green v. Hahn***, 2004 WI App 214, ¶27, 277 Wis. 2d 473, 689 N.W.2d 657. We affirm a trial court's discretionary determination when the court applies the correct legal standard to the facts of record and reaches a reasonable result. ***Hughes v. Hughes***, 223 Wis. 2d 111, 119-20, 588 N.W.2d 346 (Ct. App. 1998). Our task as a reviewing court is to search the record for reasons to sustain the trial court's exercise of discretion. ***Id.*** at 120.

¶5 Rick first argues that the court gave undue emphasis to Madison's relationship with Emma and Annie because Jennifer's remarriage was relatively recent and no facts support the conclusion that having stepsiblings at the same school would be a positive influence.

¶6 In determining placement, a court "shall consider all facts relevant to the best interest of the child." WIS. STAT. § 767.41(5)(am). Factors the court must consider include: (1) the parents' wishes; (2) the child's wishes; (3) the child's interaction and interrelationship with parents, siblings and others who significantly affect the child's best interest; (4) the quantity and quality of time the parents have spent with the child; (5) the child's adjustment to home, school, religion and community; (6) the child's age and developmental and educational needs; (7) whether the mental or physical health of another in the custodial home will affect

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

the child's well-being; (8) regular physical placement to provide stability; (9) availability of child care services; (10) cooperation between the parties; (11) each party's support of the child's relationship with the other parent; and (12) other factors the court may deem relevant. *See* ***id.***

¶7 The trial court made the following findings: (1) both parents wanted the child; (2) because Madison was only five, it would be unfair to ask her to make a choice; (3) Emma and Annie play a significant role in Madison's life and it would be "a big advantage" to all be at the same school; (4) Rick and Jennifer had spent roughly the same amount of time with Madison, and had equal custodial roles and decision making; (5) Madison had adjusted well to shared placement and would continue to be well-adjusted; (6) it was important to enroll Madison in a school where she could get "the best of both worlds," and her stepsisters' presence and mother's volunteer work at Southport tipped the scales in that direction; (7) any negative interaction between Madison and her stepsisters was "normal behavior" for siblings; (8) transferring primary placement to Jennifer would afford predictability and stability for Madison; (9) child care was not an issue; (10) until the placement petitions were filed, the parties' cooperation and communication were good; and (11) there was no indication of abuse or drug or alcohol issues.

¶8 The court then noted its authority to indicate which of the factors it accorded the most weight and observed that it would "go back to the households." Trial testimony disclosed that Rick works Monday through Friday from 7:30 a.m. until 4:30 p.m., and one weekend a month. Jennifer works 5:30 p.m. to 10:00 p.m. Tuesdays, Wednesdays and Thursdays, and every other weekend. Rick, who also had remarried, testified that his wife typically drove Madison to and from school. Jennifer testified that when she had Madison, they spent the day together, often volunteering at Southport school, and ate dinner before Jennifer left for work.

¶9 The "major factor" in the court's view was Emma's and Annie's presence in the home. The court commented that the girls would "give [Madison] an example how to get through school, how to function in life…. She has two older sisters that are going to help her get through school, get through issues when she turns to be a teenager." Jennifer testified that the three girls ask when they will see each other again and play well together, especially Madison and Annie, who are nearest in age. Madison's maternal grandfather testified about the three girls' close relationship and that Madison already is involved at Southport through attending her stepsisters' events. The court also viewed Jennifer's volunteer activities at Southport school as an important example of contributing to the community. Trial testimony established that Madison enjoys accompanying her mother to the school and getting to know teachers and staff. We cannot agree with Rick that the trial court's conclusion as to the value of Madison's bond with her stepsisters was based on unsupported assumptions.

¶10 Rick also argues that the trial court gave the GAL's recommendation short shrift. He notes that the GAL "properly placed weight" on Jennifer's proposed placement schedule which was "not … as generous in her secondary placement proposal with [Rick] as [Rick] was with her," but the trial court gave that factor no weight. He also complains that the trial court did not adopt the GAL's negative view of Jennifer's work schedule. On that point, the court opined:

> It's nothing major. So she's gone three days during the week at night. There's nothing wrong with that. It sets an example that mom is earning a living. What's wrong with that example? And there's a reliable person in the household when she's gone…. So the work schedule to me is not that moving for me.

¶11 The weight of the testimony is peculiarly within the province of the trial court acting as the trier of fact. ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 533, 485 N.W.2d 442 (Ct. App. 1992). We must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. WIS. STAT. § 805.17(2). Here, the trial court heard testimony of the parties and other witnesses and the GAL's recommendation. A court is not bound by a GAL's recommendation. ***F.R. v. T.B.***, 225 Wis. 2d 628, 642-43, 593 N.W.2d 840 (Ct. App. 1999). If it were, there would be no need for a hearing. We conclude that the court considered the recommendation, but gave its reasons for departing from it. We cannot disturb the trial court's judgment simply because the GAL's recommendation might have supported a different result.

¶12 In cases such as this, the trial court shoulders the Solomonic task of exercising its discretion to determine what is in the child's best interest. The court here applied the correct legal standard to the facts of record and reached a reasonable result. *See* ***Hughes***, 223 Wis. 2d at 119. We must affirm.

By the Court.—Order affirmed.

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