COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1155 **Cir. Ct. No. 2008FA82**

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

IN RE THE MARRIAGE OF:

KRISTIN J. KORONKIEWICZ, P/K/A KRISTIN J. KORONKIEWICZ-SPITZMACHER,

PETITIONER-RESPONDENT,

V.

JASON LEE SPITZMACHER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Jason Spitzmacher appeals a postdivorce order denying modification of physical placement and ordering reimbursement for attorney fees and the cost of mediation. We affirm.

¶2 Jason and Kristin Spitzmacher were married on August 28, 2005 and divorced March 27, 2009. One child was born of the marriage. On March 27, 2009, the parties entered into a marital settlement agreement which, among other things, provided for joint custody and that each parent should be able to spend time with the child "on an approximate 50/50 basis."

¶3 The parties operated under the terms of the MSA for several months, but on September 10, 2009, Jason filed an order to show cause seeking to modify child support. Jason contended his income was reduced because he worked less overtime. The family court commissioner denied the motion, based on the fact that Jason's income was "$50 less than March 2009."

¶4 On April 30, 2010, Jason filed another order to show cause seeking to reduce his child support and modify placement. Jason contended the parties' income had changed, and "with [the] child in school Jason has less time with [his son]." On August 27, 2010, the parties entered into a stipulation that dismissed Jason's motion on the merits and acknowledged that the MSA "was a compromise of all issues and included provisions for placement of the minor children and for child support." The parties further acknowledged that "no change of circumstance has occurred since the divorce judgment." They also agreed the stipulation was a final order and "subject to the two (2) year rule as it pertains to future

modifications of physical placement as outlined in WIS. STAT. § 767.451(1)[(a)]."[1] The court commissioner found the terms of the stipulation to be fair and reasonable and signed an order adopting it.

¶5 On December 9, 2010, Jason filed another motion seeking an order for mediation concerning the placement schedule. Mediation was ordered by the court commissioner, and Kristin then requested a hearing and a stay pending the outcome of the hearing. The court granted the stay and set the matter for hearing.[2] Jason then filed a motion for revision of placement, specifically seeking "an order for alternating weekly placement or a 2-2-3 placement schedule." Among other things, Jason averred in an affidavit supporting the motion that since the date of divorce substantial changes in circumstances had occurred, due to the child attending school, which resulted in a substantial reduction in the "amount of quality time the child is able to spend" with his father. The court commissioner ordered the parties to attend mediation, and Kristin filed a motion for de novo review and contempt.

¶6 On March 16, 2011, a hearing was held before the circuit court. At the hearing, Kristin testified that nothing had changed since the parties entered into the stipulation adopting the MSA. Jason argued that in the future he would be

[1] Within two years after final judgment, except as provided in WIS. STAT. § 767.451(2), a court may not modify an order of physical placement if the modification would substantially alter the time a parent may spend with the child unless substantial evidence shows the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interests of the child. *See* WIS. STAT. § 767.451(1)(a).

All references to Wisconsin Statutes are to the 2009-10 version unless noted.

[2] Jason had appeared pro se, and on January 4, 2011, a notice of appearance was filed by an attorney representing Jason.

switching from third to first shift at work, and therefore it would be in the child's best interest for a placement change to occur. Jason also contended that his proposed change in placement was not a "substantial modification," and therefore WIS. STAT. § 767.451(3) applied to this case rather than § 767.451(1).[3]

¶7 The circuit court found Jason not credible, and determined that Jason had not alleged or shown any conditions necessary to change placement. The court further stated:

> The parties have agreed that there would be no changes of this order as set forth in that [stipulation] for two years from the date of August 27, 2010, and I'm finding that that controls, and the purpose behind that was, again, to put an end to the nonsense here as far as continually filing orders to show cause.

¶8 The court found Jason's motions frivolous. It ordered Jason to reimburse Kristin for her costs of mediation and $1,800 in attorney fees. This appeal follows.

¶9 Whether to modify a placement or custody order is directed to the circuit court's discretion. ***Hughes v. Hughes***, 223 Wis. 2d 111, 119, 588 N.W.2d 346 (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 circuit court's exercise of discretion. However, when the contention is that the circuit court erroneously exercised its discretion because it applied an incorrect legal standard, we review that issue independently. ***Id.***

[3] WISCONSIN STAT. § 767.451(3) provides that a court may modify a physical placement order which does not substantially alter the amount of time a parent may spend with his or her child if the court finds that the modification is in the best interests of the child.

¶10 Jason argues the circuit court incorrectly applied a legal standard concerning his motion to revise placement. He claims the parties' stipulation "does NOT dictate a limitation to [WIS. STAT. §] 767.451(1)(a) for *all* changes in placement that either party requests." Jason insists the court had no authority to hear his motion under § 767.451(1), which provides authority for revisions of custody or physical placement orders when substantial modifications are shown. He insists he only requested a schedule change and did not wish to substantially alter the parties' agreement. Jason asserts that "since the parties could not agree on a schedule that was an approximate 50-50 sharing of placement as set forth in the parties' MSA, Jason brought this motion and clarified in his affidavit that the change requested would not substantially alter the placement granted in the divorce." He requests a change in the schedule to maximize the child's time with both parents because the current schedule did not do that.

¶11 Jason's argument relies on an incorrect perception. Despite general language in the MSA that it was the parties' intent to "maximize time spent with both parents on an approximate 50/50 basis," the actual physical placement was spelled out in detail in the placement schedule and it was not equal. As the circuit court observed, "This is the schedule that the two of you have worked out. This is what you are going to live by."

¶12 In addition, Jason's proposal was by no means a mere schedule change. It was in fact an effort to substantially alter the parties' agreement; the placement days, hours and number of overnights would all drastically change. The circuit court properly analyzed the motion by determining that Jason's proposal constituted a substantial modification of the placement schedule. Jason brought the motion within two years and failed to show under WIS. STAT. § 767.451(1)(a) that modification of placement was necessary to prevent physical

or emotional harm to the child's best interests. The court correctly concluded that Jason's argument was specious.

¶13 Jason next argues the circuit court erroneously allowed the date of the stipulation, rather than the date of the divorce judgment, to control the two-year "truce period" set forth in WIS. STAT. § 767.451.[4] Jason contends the August 2010 stipulation improperly "restarted the clock for the statutory 'truce period' for substantial modifications of placement."

¶14 However, Wisconsin courts have repeatedly held in the context of divorce actions that parties may stipulate to conditions that could not ordinarily be ordered by a court. *See, e.g.*, ***Lawrence v. Lawrence***, 2004 WI App 170, ¶6, 276 Wis. 2d 403, 687 N.W.2d 748 (citing ***Rintelman v. Rintelman***, 118 Wis. 2d 587, 594-96, 348 N.W.2d 498 (1984)).[5] Both parties in this case agreed to the terms of the stipulation after negotiating the issues, and both were subject to the terms of the stipulation. Those terms were found to be fair and reasonable, and adopted by the court. Contrary to Jason's perception, the terms of the stipulation were in the child's best interests and not contrary to public policy.

¶15 Jason next argues the circuit court erroneously exercised its discretion when it "specifically prevented any [future] change to the father's work schedule from being a substantial change allowing an amendment of the schedule

[4] The legislature intended to provide a "time-out" or "truce period" of two years during which the child and parents can adjust to the new family situation. In this two-year period, the courts are not to be battlefields where wounded parents turn their children as weapons against one another. The reasons for judicial intervention in the established custodial arrangement during the two-year period must be compelling. *See* ***Paul M.J. v. Dorene A.G.***, 181 Wis. 2d 304, 310, 510 N.W.2d 775 (Ct. App. 1993) (citation omitted).

[5] We note that Jason fails to address these cases in his reply brief.

agreed to in the marital settlement agreement." This issue is irrelevant. Any reference by the court to a potential schedule change was dicta and should be disregarded.

¶16 Jason next argues the circuit court erred by awarding Kristin mediation costs and attorney fees upon its finding of frivolousness. He insists that WIS. STAT. § 802.05 "controls the procedures that must be followed by a party and the courts when determining frivolousness."[6] He contends that "Kristin failed to comply with the 'safe harbor' provision of [§] 802.05(3)(a)1[.] in that she did not serve a motion that contained an allegation of frivolous conduct on Jason and wait the required 21 days before filing it with the court." According to Jason, the "safe harbor" is a strict requirement, and the court was therefore not permitted to award attorney fees and costs. We are not persuaded.

¶17 MARINETTE COUNTY CIRCUIT COURT RULE 1207 (Eighth Judicial Dist.) (rev. April 9, 2008), provides: "The cost for custody and physical placement mediation provided by family court counseling services shall be paid equally by the parties unless otherwise ordered by the judge or court commissioner."[7] Here, the circuit court appropriately concluded Jason should bear the mediation cost, stating:

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[6] Although not discussed by the parties, it does not appear from the record that Jason raised the issue of WIS. STAT. § 802.05 in the circuit court. As a general rule, we will not decide issues which have not been raised in the trial court. ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974).

[7] Kristin argued in her response brief that local rules authorized the court to award the mediation costs. Jason failed to reply to this argument, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

> I do find that these are frivolous, that you're filing these – continually coming after her for this. There should be – there's no reason for mediation in this case because this should not have been filed anyway, so I'm going to order you to repay the mediation fee that she paid.

¶18 In addition, Wisconsin courts have routinely held that circuit courts may award attorney fees and costs in a divorce action when one party's unreasonable approach to litigation causes the other party to incur extra and unnecessary fees. *See* ***Zhang v. Yu***, 2001 WI App 267, ¶¶13-14, 248 Wis. 2d 913, 637 N.W.2d 754; ***Randall v. Randall***, 2000 WI App 98, ¶22, 235 Wis. 2d 1, 612 N.W.2d 737. Overtrial is a common law doctrine that arises from the court's inherent authority to manage the family law cases over which it has jurisdiction. *See* ***Zhang***, 248 Wis. 2d 913, ¶14. The decision whether to award attorney fees is committed to the circuit court's discretion. ***Randall***, 235 Wis. 2d 1, ¶22.

¶19 In her motion for de novo review, Kristin requested an order for "costs and attorney fees and for such further relief as the court deems appropriate." Jason had an adequate opportunity to respond to Kristin's request. The court made factual determinations concerning the request for fees and costs and they are not clearly erroneous. *See* WIS. STAT. § 805.17(2). The court found the child was already in school, Jason had yet to commence a new work schedule, and there was no proof of physical or emotional harm to the child's best interests.

¶20 It is apparent from the court's oral decision that it believed a significant portion of Kristin's attorney fees liability was due to the nature in which Jason pursued his litigation. Indeed, the court specifically found the purpose of the parties' stipulation was to "put an end to the nonsense here as far as continually filing orders to show cause." The court had a sufficient basis to award attorney fees independent of WIS. STAT. § 802.05, and it implicitly determined that

Jason's conduct constituted overtrial. The court's decision to award attorney fees and costs, as a whole, incorporated appropriate considerations and was a proper exercise of discretion.[8]

¶21 Finally, Kristin filed a motion with this court requesting fees and costs for a frivolous appeal. In this regard, we note Kristin filed a fifty-two page brief containing more than 7,400 words in response to Jason's brief on appeal. Although not dispositive, this fact undercuts the persuasiveness of her argument that the appeal is frivolous. In any event, we do not consider the entire appeal frivolous and deny the motion.

By the Court.—Order affirmed.

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

[8] On appeal, we do not discern Jason's argument to include the reasonableness of the amount of fees and costs. The issue is therefore waived. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).