COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP282 **Cir. Ct. No. 2013FA856**

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

IN RE THE MARRIAGE OF:

ROLANDO XAVIER SANCHEZ,

PETITIONER-RESPONDENT,

V.

LORRIE SUZANNE HOFFMANN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Lorrie Hoffmann appeals the child placement portion of a judgment dissolving her marriage to Rolando Sanchez. Hoffmann

argues the circuit court erroneously exercised its discretion by: (1) making a placement decision that was both prospective and contingent; (2) basing its "prospective" placement decision on what would, by the time of the "prospective" placement, be outdated recommendations rather than "present" information; (3) failing to give Hoffmann equal time to present her case; and (4) failing to maximize the amount of time the children would spend with each parent. We reject Hoffmann's arguments and affirm the judgment.

BACKGROUND

¶2 Hoffmann and Sanchez were married in February 2010 and have two minor children. In February 2012, Hoffmann petitioned for divorce in Wisconsin but the parties later reconciled and the action was dismissed by stipulation in October 2012. In November 2012, Hoffmann petitioned for divorce in Illinois. The parties again reconciled, but the Illinois action remained pending. In November 2013, Sanchez filed the underlying divorce action in Wisconsin. Hoffmann then moved for a default judgment in Illinois, seeking custody and primary placement of the children. Hoffmann, however, voluntarily dismissed the Illinois action in January 2014.

¶3 Reports containing the recommendations from a court-ordered custody study were filed in December 2014. A contested divorce trial was held over a five-day period from January to October 2015. Hoffmann, who lives in the Chicago area, and Sanchez, who lives in Appleton, both sought primary physical placement of the children. The circuit court ultimately awarded the parties joint custody, but determined the children would attend school in Appleton. The court set an equal shared placement schedule from the date of the October 2015 order until September 2016, when the parties' older child would begin kindergarten.

Sanchez was awarded primary placement during the school year, and Hoffmann was given placement during spring break and other designated holidays, as well as five weekends in a six-week rotation with attached weekdays if there was no school. During the summer, the court established a week on/week off shared placement schedule.

¶4 Hoffmann filed a motion for reconsideration challenging several details of the placement schedule and asserting, in relevant part, that because Sanchez will have primary placement during the school year, she should be given the majority of the summer placement to maximize her time with the children. From the record, it does not appear the circuit court formally ruled on the motion but, rather, ordered the parties to mediation. This appeal follows.

DISCUSSION

¶5 WISCONSIN STAT. § 767.41 (2015-16)[1] authorizes circuit courts to make any provisions they deem "just and reasonable" concerning the legal custody and physical placement of minor children subject only to the limitations imposed by statute. 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). We will sustain a discretionary decision if the 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). "Although the proper exercise of discretion contemplates that the circuit court explain its reasoning,

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

when the court does not do so, we may search the record to determine if it supports the court's discretionary decision." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. In addition, we affirm the circuit court's findings of fact unless they are clearly erroneous, WIS. STAT. § 805.17(2), but we independently review any questions of law, ***Clark v. Mudge***, 229 Wis. 2d 44, 50, 599 N.W.2d 67 (Ct. App. 1999).

¶6 Citing ***Koeller v. Koeller***, 195 Wis. 2d 660, 536 N.W.2d 216 (Ct. App. 1995), Hoffmann contends the circuit court erroneously exercised its discretion by awarding prospective placement to Sanchez contingent upon the parties' older child beginning kindergarten.[2] ***Koeller***, however, is distinguishable on its facts. There, a mother who was suffering from terminal cancer and whose ex-spouse had a history of mental illness moved the circuit court to revise a divorce judgment to grant custody to her sister in the event of her incapacity or death. ***Id.*** at 662. The circuit court granted the motion and entered a prospective custody judgment. ***Id.*** at 662-63. This court reversed the judgment, concluding, in relevant part, that there was no authorization in the law for a change of custody

[2] Hoffmann cites two unpublished per curiam opinions in her brief, and Sanchez cites the same opinions in responding to Hoffmann's arguments without alerting this court that the citations violate our appellate rules. WISCONSIN STAT. RULE 809.23(3)(a) prohibits citation of unpublished opinions as precedent or authority, "except to support a claim of claim preclusion, issue preclusion, or the law of the case, and except as provided in par. (b)." RULE 809.23(3)(b), in turn, states that *authored*, unpublished opinions issued on or after July 1, 2009, may be cited for their persuasive value. The unpublished per curiam opinions were not used to support a claim of claim preclusion, issue preclusion, or the law of the case. We admonish the parties that improper citations to unpublished opinions in the future may result in sanctions.

We further admonish Hoffmann for failing to use record cites, where necessary, in her reply brief. *See* WIS. STAT. RULE 809.19(4)(b).

at some unknown time in the future "based on circumstances that might not exist when the order is to take effect." ***Id.*** at 667-68.

¶7 Here, the circuit court did not order a prospective change in placement, but merely provided for a change based upon an event that will take place at a known time. The event of the parties' older child beginning kindergarten was known and set to occur at an established time. Deciding a change in the placement schedule in advance of this event was appropriate and saved the parties from having to return to the circuit court within a relatively short period of time. Moreover, Hoffmann sought primary placement during the academic year to accommodate the children's school schedule, thus inviting the circuit court to establish the type of placement schedule Hoffmann now challenges as impermissibly prospective.

¶8 Hoffmann nevertheless argues that the circuit court erred by basing its placement decision on what would, by the time of the school year placement, be nearly two-year-old placement recommendations rather than "present information." Hoffmann, however, forfeited this argument by failing to first raise it in the circuit court. *See* ***Schinner v. Schinner***, 143 Wis. 2d 81, 94 n.5, 420 N.W.2d 381 (Ct. App. 1988) (generally, an issue must be raised in circuit court to be eligible for review upon appeal). In any event, Hoffmann's argument on this point is undeveloped, as she fails to explain what, if any, information had changed or how any "present information" would have altered the recommendations made or the court's ultimate placement decisions. Further, after testimony concluded, the guardian ad litem and the custody evaluator were given the opportunity to inform the court if their opinions had changed based on the evidence presented at trial, thus effectively updating their respective recommendations in real time.

¶9 Hoffmann next contends the circuit court failed to give her equal time to present her case. Although Sanchez claims Hoffmann forfeited this argument by failing to first raise it in the circuit court, Hoffmann contends "[t]here were references by [her] counsel memorializing that [Hoffmann] was not receiving equal time to present her case." The cited statements were made after the circuit court determined, based on the time of day, that the trial had to be adjourned and reconvened another day. Hoffmann's trial counsel responded:

> You want to set up another time? I mean, my entire case went in in three hours. That's two hours of cross today. He was on the stand for eight hours. I'm trying not to make it go to my client, I'll be honest, that I'm not putting on a case. You know, we keep coming back and coming back. Nobody wants to do it. At the same time my case has been three hours. We've been here for three and a half days for [Sanchez]. At some point we need to hear from the guardian ad litem and do closing arguments.

We do not interpret these statements as a complaint that Hoffmann deserved or wanted more time, but that Sanchez might be overlitigating the matter. Thus, we agree Hoffmann forfeited her "equal time" argument by failing to adequately raise it below. In any event, Hoffmann fails to explain what, if any, evidence she was precluded from presenting in the circuit court.

¶10 Hoffmann alternatively contends the circuit court erroneously exercised its discretion by failing to "maximize[] the amount of time the child may spend with each parent" as required under WIS. STAT. § 767.41(4)(a)2. Hoffmann specifies that because Sanchez was awarded primary placement during the school year, the only way to maximize Hoffmann's time with the children was to award her primary placement during the summer. We are not persuaded. Although joint legal custody is presumed to be in the best interests of the child, *see* WIS. STAT.

§ 767.41(2)(am), there is no parallel presumption about equal placement, *see* ***Keller v. Keller***, 2002 WI App 161, ¶12, 256 Wis. 2d 401, 647 N.W.2d 426.

¶11 Further, Hoffmann's emphasis on the statutory language regarding maximization of time ignores the remainder of the statute, which provides that in determining allocation of periods of physical placement, the court shall consider each case on the basis of delineated statutory factors and "set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households." WIS. STAT. § 767.41(4)(a)2.

¶12 Our supreme court has held that the circuit court must attempt to maximize a child's time with each parent "within the context of the various other considerations the court is instructed to contemplate under [WIS. STAT. § 767.41]." ***Landwehr v. Landwehr***, 2006 WI 64, ¶20, 291 Wis. 2d 49, 715 N.W.2d 180. Thus, the general directive to maximize time with each parent "does not trump the other considerations specifically required in the statute." ***Id.***, ¶18. Further, "[t]he term 'maximize' does not supersede the [circuit] court's discretion to construct a schedule it determines is in the best interest of the child and otherwise in conformity with the intricate dictates of [§ 767.41]." ***Id.***, ¶20.

¶13 Here, the circuit court articulated its reasoning and consideration of the statutory factors set forth in WIS. STAT. § 767.41(5)(am)1.-16., "relevant to the best interest of the [children]," reaching its placement decision based on the evidence and its credibility determinations. In particular, the circuit court acknowledged that while "the ideal" would have been "50/50 placement" in a community where both parents live near each other, equal placement was not

feasible here, where there is a three and one-half hour travel time between households. The court noted that the strong sibling relationship the children have with their half-brother in Appleton was a significant factor in its decision. *See* WIS. STAT. § 767.41(5)(am)3.

¶14 When considering the amount and quality of time each parent has spent with the children in the past, *see* WIS. STAT. § 767.41(5)(am)4., the court acknowledged Hoffmann was the primary caregiver early in the children's lives; however, the court also recognized that Sanchez is an involved father who provided daily care and supervision for his children. With respect to "any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future," *see* ***id.***, the court determined Sanchez had exhibited a greater willingness to adjust his job and life to benefit his children.

¶15 Another significant factor cited by the circuit court was the level of cooperation and communication between the parents. *See* WIS. STAT. § 767.41(5)(am)10. Although the court recognized neither party was without fault on this front, the court found Sanchez to be more credible on "some of these issues regarding cooperation." To the extent Hoffmann may challenge the circuit court's credibility determinations, the circuit court, as fact finder, "is the ultimate arbiter of the weight and credibility afforded to the evidence." ***Bonstores Realty One, LLC v. City of Wauwatosa***, 2013 WI App 131, ¶33, 351 Wis. 2d 439, 839 N.W.2d 893. The court also determined Sanchez to be "the more generous parent," noting Hoffmann was not as open to allowing Sanchez additional time with the children as Sanchez. *See* WIS. STAT. § 767.41(5)(am)11. Ultimately, the circuit court considered proper factors before setting a placement schedule that it deemed to be in the best interest of the children. Hoffmann's disagreement with the circuit

court's well-reasoned decision does not establish an erroneous exercise of the circuit court's discretion.

By the Court.—Judgment affirmed.

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