COURT OF APPEALS
DECISION
DATED AND RELEASED

November 20, 1996

Nos. 95-1030
95-2225

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

In re the Marriage of:

NANETTE M. M.,

Joint-Petitioner-Respondent-Cross Appellant,

v.

GERALD J. M.,

Joint-Petitioner-Appellant-Cross Respondent.

APPEAL and CROSS-APPEAL from orders of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

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

PER CURIAM. Child custody, physical placement and child support are at issue in this post-divorce appeal and cross-appeal. The father, Gerald J. M., is appealing orders transferring custody of Lauren to her mother, Nanette M. M. and placing Lauren at the Menninger Clinic. Gerald is also appealing the order revising his child support obligation. On cross-appeal,

Nanette is appealing an order changing custody and physical placement of another child, Collin, and the order assessing the cost of Lauren's first six weeks of treatment at the Menninger Clinic to her.

Because the family court utilized the incorrect legal standard when it changed custody of Lauren, we reverse that order. We decline to review the placement order because Lauren is no longer a patient at the Clinic. Thus, that portion of the appeal is moot. We conclude that the court properly exercised its discretion when it revised Gerald's support obligation and when it assessed the cost of Lauren's treatment at the Clinic to Nanette. Lastly, we conclude that the question of Collin's custody is not properly before this court.

LAUREN'S CUSTODY AND PLACEMENT AT MENNINGER CLINIC

The judgment of divorce between Gerald and Nanette was entered on September 11, 1991. The judgment provided for joint custody of the couple's three children, Sean, Collin and Lauren. Physical placement of the children was with Nanette. Gerald moved to change placement on April 30, 1993. After several evidentiary hearings, the court, on January 21, 1994, awarded sole custody of the boys to Gerald and sole custody of Lauren to Nanette. The court did not address child support at that time.

When further proceedings were held on the financial issues, difficulties with Gerald's visitation with Lauren and her placement were presented to the court. The record shows that Lauren's emotional and mental health deteriorated significantly during 1994. Additional hearings pertinent to Lauren's placement and visitation were held in June and July. At the close of a two-day evidentiary hearing in late July, the court ordered that Lauren be reexamined by Dr. Poznanski, a Chicago psychiatrist who had previously examined her. That reexamination was scheduled for September 9. However, on September 6, 1994, Lauren was admitted to the Menninger Clinic in Topeka, Kansas. Lauren's admission, arranged by Nanette, occurred without notice to the court, her guardian ad litem, her treating psychiatrist or Gerald.

Gerald then filed a motion to change custody and placement of Lauren. Gerald's motion was filed on September 9, 1994 and was heard by the court on September 16 and October 19. At the close of the October 19 hearing, the court denied Gerald's motion to change custody of Lauren. Although it repeatedly expressed frustration with the manner in which Lauren arrived at the Menninger Clinic, the court ordered that physical placement of Lauren be transferred to the Clinic indefinitely. Lauren remained at Menninger until early January 1995 at which time she was placed in a foster home in Wood County. Further facts will be stated as necessary to discuss the custody and placement issues.

The first issue is whether the family court erroneously exercised its discretion when it awarded custody of Lauren to Nanette. A family court's discretionary determination will be upheld on appeal when the record shows that the court examined the relevant facts, applied the correct standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson,*** 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). A court erroneously exercises its discretion when it applies an incorrect or improper standard of law. *See* ***State v. Hutnik,*** 39 Wis.2d 754, 763, 159 N.W.2d 733, 737 (1968).

A motion to revise custody or physical placement is governed by § 767.325, STATS., which establishes different legal standards depending on when the court addresses the request. Under § 767.325(1)(a), a court may not modify a custody or physical placement order "before 2 years after the initial order" unless the moving party "shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child." Under § 767.325(1)(b), a court may modify custody or physical placement after the initial two-year period if the court finds that the modification is in the best interest of the child and there has been a substantial change in circumstances since the entry of the last order affecting custody or physical placement. Section 767.325 "reveals a legislative intent to discourage modification of custody or physical placement awards within two years of their initial issue." ***Andrew J.N. v. Wendy L.D.***, 174 Wis.2d 745, 763, 498 N.W.2d 235, 240 (1993). The legal standard of § 767.325(1)(a) is "much higher" than the "general best interests standard, which applies to modifications made after the initial order has been in force for two years." ***Id.***

Gerald argues that the family court erroneously applied the higher standard of § 767.325(1)(a), STATS., when it denied his motion to change Lauren's custody and physical placement. We agree. The initial custody and placement order is found in the judgment of divorce that was entered on September 11, 1991. The custody order challenged by Gerald was made on October 19, 1994, in response to Gerald's September 9, 1994 motion. The two-year "truce period" had ended, and the lesser standard found in § 767.325 (1)(b) must be applied.

The record shows, however, that the family court applied the higher standard. Initially, the court correctly noted that "we're under the best interest standard ... because it's been more than two years" since the initial custody order. However, upon prompting by the guardian ad litem, the court changed course, and ruled that "the standard that I have to follow here is substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child."[1]

Nanette argues that, despite the court's reference to the higher standard, it actually applied the "best interest" standard of § 767.325(1)(b), STATS. We cannot read the record so loosely, and cannot disregard the court's express statement that it was applying the higher standard.

Because the family court applied the incorrect legal standard, its custody order as to Lauren must be reversed. On remand, the court should reconsider Lauren's custody in light of the "best interest" standard of § 767.325(1)(b), STATS. We expressly direct that the court do so on the strength of the record developed thus far. The trial court judge has become intimately familiar with the parties, their children and the factual circumstances of this case, and is best-equipped to address the ongoing disputes between Gerald and Nanette. Therefore, neither party will be entitled to substitution of judge under § 801.58(7), STATS. *See* ***State ex rel. Hubert v. Circuit Court for Winnebago County,*** 163 Wis.2d 517, 471 N.W.2d 615 (Ct. App. 1991) (post-appeal

[1] The guardian ad litem concedes that he misled the trial court, and urges reversal of the custody order.

substitution of judge is not available whenever a divorce judgment is reversed and remanded for further consideration of any aspect of the judgment on the strength of the record developed at trial).

Gerald next contends that the family court erred when it transferred physical placement of Lauren to the Menninger Clinic. Lauren was in in-patient treatment at the Clinic until January 1995 when the mounting cost of treatment led to her discharge and placement in foster care.

We decline to address this issue. Lauren is no longer physically placed at the Menninger Clinic. Therefore, the question is moot, and none of the exceptions to the mootness doctrine are present in this case. *See* ***Lenz v. L.E. Phillips Career Dev. Ctr.,*** 167 Wis.2d 53, 66-67, 482 N.W.2d 60, 64 (1992); ***State ex rel. LaCrosse Tribune v. Circuit Court,*** 115 Wis.2d 220, 229, 340 N.W.2d 460, 464 (1983).

CHILD SUPPORT

The next issue is whether the family court erred when it utilized the percentage standard in setting Gerald's child support obligation. Gerald contends that use of the percentage standard in light of his above-average income results in a child support award that greatly exceeds Lauren's needs.[2] Gerald also relies on the fact that Lauren did not physically reside with Nanette for several months in 1994 and 1995 while she was at the Menninger Clinic and in foster care. Gerald notes that the child support award greatly exceeds the cost of foster care chargeable to Nanette.

The determination of appropriate child support is committed to the discretion of the family court. ***Mary L.O. v. Tommy R.B.,*** 199 Wis.2d 186, 193, 544 N.W.2d 417, 419 (1996). "An appellate court will sustain a discretionary act if it finds that the family court examined relevant facts, applied a proper

[2] Gerald is a physician whose annual income for child support purposes was $200,000. After offsetting Nanette's child support obligation for Sean and Collin (who reside with Gerald), the court ordered Gerald to pay monthly child support of $1458.

standard of law, and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach." ***Id.***

Under § 767.25(1j), STATS., a family court is required to set child support using the percentage standard, but the court may modify the amount if "the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties." Section 767.25(1m), STATS. The statute lists several factors that a court should consider when determining whether use of the standard would be unfair.[3] The

[3] The factors enumerated in § 767.25(1m), STATS., are:

(a) The financial resources of the child.
(b) The financial resources of both parents as determined under s. 767.255.
(bj) Maintenance received by either party.
(bp) The needs of each party in order to support himself or herself at a level equal to or greater than that established under 42 USC 9902(2).
(bz) The needs of any person, other than the child, whom either party is legally obligated to support.
(c) The standard of living the child would have enjoyed had the marriage not ended in annulment, divorce or legal separation.
(d) The desirability that the custodian remain in the home as a full-time parent.
(e) The cost of day care if the custodian works outside the home, or the value of custodial services performed by the custodian if the custodian remains in the home.
(ej) The award of substantial periods of physical placement to both parents.
(em) Extraordinary travel expenses incurred in exercising the right to periods of physical placement under s. 767.24.
(f) The physical, mental and emotional health needs of the child, including any costs for health insurance as provided for under sub. (4m).
(g) The child's educational needs.
(h) The tax consequences to each party.
(hm) The best interests of the child.
(hs) The earning capacity of each parent, based on each parent's education, training and work experience and the availability of work in or near the parent's community.
(i) Any other factors which the court in each case determines are relevant.

percentage standard may be applied to a high-income payor provided the court consider the relevant factors and "reach[] a reasoned conclusion that the use of the percentage standard[] ... would not be unfair to [the payor]." ***Tommy R.B.,*** 199 Wis.2d at 195-96, 544 N.W.2d at 420-21.

The record shows that the court properly exercised its discretion. The court noted that there was no evidence that use of the percentage standard would "be a hardship to or detrimental to [Gerald] or to any of the children." At a later hearing, in response to Gerald's request for reconsideration, the court noted

> that based upon all the changes that are taking place here, the fact that [Nanette's] household has to be maintained, the fact that costs are going -- are in a constant state of fluctuation that it's fair to apply the percentage standards as opposed to something different because the something different means that we've got to come back here every month, and I have to personally review the situation because it's going to change every month.

Those comments are similar to the sentiments expressed by the supreme court in ***Tommy R.B.,*** when the court noted that while "[e]very child support order is premised on present needs, [it also] extends into the future because it anticipates future needs and continues until a change in circumstances requires a modification in the order." ***Id.*** at 199, 544 N.W.2d at 422. Because the court properly exercised its discretion, we affirm the determination of child support.

MENNINGER CLINIC EXPENSES

As noted above, Lauren was initially admitted to the Menninger Clinic without prior court notice or approval. Ultimately, the court did authorize her continued placement and in-patient treatment at the Clinic. However, the court refused to assess against Gerald any of the cost of Lauren's treatment prior to the transfer of physical placement to the Clinic.[4] That $30,000 liability was assigned to Nanette. On cross-appeal, Nanette argues that the court erred. We are not persuaded.

The judgment of divorce incorporated the terms of a Marital Settlement Agreement. As to the children's health insurance, the Settlement Agreement provided:

> All uninsured medical expenses for the minor children shall be divided equally between the parties. Medical expenses include, but are not limited to, those for services rendered for ... psychotherapy, counseling, other medical needs and prescriptions. However, *a party shall not be responsible to contribute to uninsured medical expenses of a non-emergency nature in an amount in excess of $100 (total per illness or injury) unless that party has agreed in advance to the medical treatment* for the minor child giving rise to the uninsured medical expense. (Emphasis added).

The court found that Lauren's admission to the Menninger Clinic was not an emergency. Although Nanette disagrees with that factual finding, it is supported by the record, and this court will not disturb it. *See* ***Gardner v. Gardner,*** 190 Wis.2d 216, 243, 527 N.W.2d 701, 705 (Ct. App. 1994). Because Lauren's treatment at the Menninger Clinic was "of a non-emergency nature" and because Gerald did not agree in advance to the treatment, he is not

[4] The court ordered that the parties share on an equal basis the cost of Lauren's in-patient treatment after physical placement was transferred to the Clinic. Neither party challenges that order.

responsible to contribute to the expense. The court's order is consistent with the Marital Settlement Agreement and must be upheld.

COLLIN'S CUSTODY AND PLACEMENT

Custody and placement of Collin was awarded to Gerald on January 21, 1994. From that point on, the parties focused their attention on Lauren's custody and placement and on financial issues. Numerous hearings were held between January 21, 1994 and the filing of a notice of appeal, and neither party raised any issue about Collin's custody or placement. Indeed, at an October 19, 1994 hearing, Nanette's counsel acknowledged that "[t]here is no motion here asking the Court to change the custody of Collin." In her notice of cross-appeal and docketing statement, Nanette did not indicate that she was disputing Collin's custody or placement. Under these circumstances, we conclude that any challenge to Collin's custody or physical placement has been waived.[5]

Costs on appeal are denied to both parties.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

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

[5] We decline to premise our refusal to address the question of Collin's custody and physical placement on a lack of appellate jurisdiction as urged by both Gerald and the guardian ad litem. While the record shows that Collin's custody and physical placement was resolved orally on January 21, 1994 and by written order entered on August 22, 1994, child support remained unresolved for several more months. The "entire matter in litigation between the parties" was not disposed of by the August 22, 1994 order. If Nanette had filed a notice of appeal from the August 22 order, the appeal would have been dismissed as brought from a nonfinal order. *See* § 808.04(1), STATS.