COURT OF APPEALS
DECISION
DATED AND RELEASED

December 5, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3513

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

IN RE THE MARRIAGE OF:

MARY ELLYN DOERR,

Petitioner-Respondent,

v.

CHARLES A. DOERR,

Respondent-Appellant.

APPEAL from an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Eich, C.J., Roggensack and Deininger, JJ.

ROGGENSACK, J. Charles A. Doerr appeals a post-divorce order modifying the physical placement schedule of his children and raising his child support obligation from $725 to $950 per month. Charles challenges the placement modification on due process grounds and claims that the trial court

erred by deviating from the HSS guidelines, without stating its reasons on the record. He also contests a related award of attorney fees to his ex-wife.

Because Charles has shown us no authority for the due process right he claims was violated, and because we conclude the trial court properly exercised its discretion, we affirm the trial court's order for physical placement of the children. The child support guidelines are not directly applicable to this placement arrangement, which combines primary placement for one child with shared placements for two other children; therefore, we find no erroneous exercise of discretion in the manner in which the court established child support. Finally, we affirm the award of attorney fees as a proper exercise of the trial court's discretion.

BACKGROUND

Charles Doerr and Mary Ellyn Doerr (n/k/a Mattison) were divorced on January 8, 1993. The parties then had four minor children: Edward, Anna Jo, Reed, and Georgia. The divorce judgment awarded sole legal custody and primary physical placement of the children to Mary Ellyn and, based on Charles' income of $30,000/year, ordered him to pay $775[1] per month in child support. The amount changed to $725 per month when Edward reached his majority.

On April 13, 1995, Charles moved the trial court to modify the parties' physical placement schedule to reflect an informal agreement under which the three youngest children had been alternating a week at a time with each parent. Charles also requested a modification of child support and joint legal custody of the children. On May 8, 1995, Mary Ellyn moved the court to find Charles in contempt for failure to pay maintenance. She also moved for an increase in maintenance, appointment of a guardian ad litem, payment of the children's uninsured medical and dental expenses, and an award of attorney fees.

[1] The court applied the statutory guidelines: 31% of $30,000/year gross income.

The court appointed Janet Jenkins as guardian ad litem for the children. It requested Jenkins to file a written report no later than June 30, 1995, in preparation for the August 28th evidentiary hearing on all motions. In her initial report, Jenkins recommended an equal placement schedule for Reed and Georgia, with some flexible days at the children's discretion. She recommended that Anna Jo determine her own placement. However, after the children read Jenkins' report and spoke with her about it, Jenkins submitted a supplemental report. It suggested that Georgia feared her father, but did not explain why, and recommended Georgia be placed primarily with her mother and spend one day a week and alternate weekends with Charles. Jenkins still recommended equal placement for Reed, and flexibility for Anna Jo, who was to spend the upcoming school year as an exchange student in Spain.

At the evidentiary hearing, Charles objected to Jenkins' supplemental report because it was untimely. He requested mediation, rather than going forward with an evidentiary hearing on placement, and he asked the court to turn the hearing into an informal pre-trial because he said he was not prepared to counter Jenkins' supplemental report.

The court suggested entering an interim order providing alternate weekend placement of Georgia with Charles. Charles objected. Mary Ellyn opposed mediation because the parties had been unsuccessful with it in the past. She said she was ready to proceed with the hearing, notwithstanding the late report. She suggested that each party could testify about the proposed schedule. However, neither party testified about placement. Instead, the court ordered mediation, and the hearing went forward on the financial issues. At its conclusion, the court adopted the guardian ad litem's recommendation "as the order that will stay in effect until something is presented to me that would suggest I should change it as a result of this mediation or some further request for this hearing." The court denied Mary Ellyn's motions to increase maintenance and to have Charles found in contempt. It granted Mary Ellyn's motion to have Charles pay the children's medical and dental expenses for treatment he initiates without Mary Ellyn's approval. The court left open the issue of child support. The court was to be informed if mediation failed and the parties believed another hearing was needed.

On September 26, 1995, Charles wrote a letter asking the court to schedule another hearing on placement, reiterating his objections to the court's

order of August 28, 1995. On November 2, 1995, the court issued a final order on placement and child support, stating that "there is no purpose to a further hearing unless either party has some additional evidence to present, which would persuade the court that some other order would be in the best interests of the children." Neither party responded to the court's invitation. The court noted that the HSS guidelines were not readily applicable to the facts of the case because of the combined forms of placement it was ordering. It set child support at $950 per month, based on 25% of Charles' gross income, which had increased by 53% to $46,000. The court also awarded Mary Ellyn $2,000 in attorney fees. Charles appeals the denial of a second hearing on placement, the amount of child support and the award of attorney fees.

Scope of Review.

We review the trial court's placement decision and child support award under the erroneous exercise of discretion standard. ***Wiederholt v. Fischer***, 169 Wis.2d 524, 530, 485 N.W.2d 442, 444 (Ct. App. 1992); ***Abitz v. Abitz***, 155 Wis.2d 161, 174, 455 N.W.2d 609, 614 (1990). An award of attorney fees is also within the trial court's discretion, and will not be altered on appeal unless the trial court erroneously exercises its discretion. ***Bisone v. Bisone***, 165 Wis.2d 114, 123-24, 477 N.W.2d 59, 62 (Ct. App. 1991). The trial court properly exercises its discretion when it states its reasons and bases its decision on law and the facts in the record. ***Luciani v. Montemurro-Luciani***, 199 Wis.2d 280, 294, 544 N.W.2d 561, 566 (1996).

Evidentiary Hearing on Placement.

Divorce in Wisconsin is purely statutory, and is governed by the provisions of ch. 767, STATS. ***Pettygrove v. Pettygrove***, 132 Wis.2d 456, 462, 393 N.W.2d 116, 119 (Ct. App. 1986). Charles claims that the trial court's placement order must be set aside because he was denied the opportunity to be heard on the placement issue; and therefore, his due process rights were violated. Charles cites no authority for his assertion that he has a constitutional right to a hearing on a post-divorce motion to change custody and placement. His argument is supported only by general statements drawn from property law cases, which are not applicable in a divorce context. This court may choose not to consider undeveloped arguments and arguments unsupported by references

to relevant legal authority. ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). We do so in this case.

Moreover, the record does not support Charles' assertion that a hearing was denied. Charles was afforded an opportunity to be heard on placement at the evidentiary hearing held on August 28, 1995, but he wanted mediation, which the court ordered. The August hearing was not, as Charles contends, simply a pre-trial hearing. The court received the placement report; the judge spoke with the children in chambers and it did not restrict Charles from presenting evidence. It also heard testimony on financial matters. Charles expressed numerous objections to the guardian ad litem's supplemental report. The court made clear that it planned to enter a placement order that day.

The trial court did leave open the possibility of an additional hearing on placement. But holding another hearing was conditioned on the parties presenting to the court something other than the parties' statements which were already on record. Mediation was unsuccessful and Charles' subsequent letter requesting a hearing only reiterated what he had already said in court.

In its November 1995 placement order, the trial court again invited the parties to bring new information relevant to placement to its attention. Charles did not respond. Because Georgia's placement was primarily with Mary Ellyn in the court's 1993 order, it was Charles' burden to prove there had been a substantial change in circumstances warranting the change in placement he was requesting, and that the proposed modification was in Georgia's best interests. ***Wiederholt***, 169 Wis.2d at 530, 485 N.W.2d at 444; § 767.325(1)(b), STATS. He failed to show the court that he wished to present additional information relevant to those determinations, despite repeated invitations from the court that he come forward to do so. Therefore, we conclude the trial court did not erroneously exercise its discretion in basing its placement decision on the information before it.

Child Support.

A trial court may modify a child support order upon a showing that there has been a substantial or material change in the circumstances. Section 767.32(1) STATS.; ***Burger v. Burger***, 144 Wis.2d 514, 523, 424 N.W.2d 691, 695 (1988). An evidentiary hearing is necessary to determine if changes in circumstances have occurred since the last order. ***Long v. Wasielewski***, 147 Wis.2d 57, 61, 432 N.W.2d 615, 616 (Ct. App. 1988).

The Department of Health and Social Services percentage guidelines apply to revisions of child support. Section 767.32(2), STATS.; WIS. ADM. CODE HSS 80.01(2). However, the trial court does have discretion about whether to follow the guidelines. ***Long***, 147 Wis.2d at 63, 432 N.W.2d at 617.

The HSS guidelines contain provisions for deviating from the percentage standard, and require the court to state in writing or on the record the amount of support that would be required by using the percentage standard, the amount by which the court's order deviates from that amount, its reasons for finding that use of the percentage standard is unfair to the child or the party, its reasons for the amount of the modification and the basis for the modification. Section 767.25(1n), STATS.; WIS. ADM. CODE HSS 80.03(7)(b). However, HSS 80.03(7)(b) deals with placement allocations where one parent has primary physical placement of all the children. There are no specific guidelines that apply to a situation where two of the three children have 50% placement with both parents and one child has very limited time with the payer parent.[2]

The trial court specifically discussed the relevant factors under § 767.32(1), STATS. It determined (1) that Charles' gross annual income had increased by 53%, from $30,000 to $46,000, while Mary Ellyn's remained approximately what it had been previously; (2) that all the other children had attended the same private school which Georgia was then attending, and therefore, it was not unreasonable for her to have the same educational benefits they had received; (3) that while Anna Jo's expenses were difficult to measure since she would be in Spain and would be taking money she herself had earned,

[2] The guidelines do define a shared-time payer, HSS 80.02(25), and show how to calculate support for that parent. WIS. ADM. CODE HSS 80.04(2). However, Charles is a shared-time payer for Reed and perhaps for Anna Jo, but not for Georgia.

both parents would remain obligated to provide financial support to her as needed; and (4) that Charles would be ordered equal placement of Reed, but would fall below the guidelines' threshold for Georgia. All of these findings were supported by the record. The court concluded that, under the totality of the circumstances, it was fair to order the respondent to pay 25%[3] of his gross income in child support.

Charles argues that the trial court should have added all of the days that he had with each child[4], divided that total by three to determine the average number of days he had placement with the children, and used that figure to determine child support under the shared-time formula. We reject Charles' argument because there are at least two problems with his proposal. First, Charles would have the trial court subtract the $6,000 he pays Mary Ellyn in maintenance each year from his gross income before calculating his child support. Maintenance is not excluded from gross income of the payer, when child support is calculated. WIS. ADM. CODE HSS 80.02(13)(a). Second, the guidelines do not require, or even suggest, that Georgia's days with Charles should reduce his support obligation. We conclude that the trial court did not err by not explaining the amount of support available under the guidelines and the amount of its deviation because the guidelines are virtually impossible to directly apply, given the hybrid type of placement arrangement used for these children. The trial court's order, which explained why attempting to conform to the guidelines would be unfair under these facts, was a reasonable exercise of discretion.

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[3] Mary Ellyn had two children 50% of the time and one child full-time. Although the trial court did not explicitly add the two "50% children" to the one full-time child and get the equivalent of two full-time children, the trial court did apply the 25%, two-child guideline, to Charles' $46,000 of income, resulting in $950 per month as his child support obligation.

[4] He included 182 days for Anna Jo, even though she would be in Spain during the school year; and all of his days with Georgia, even though that placement does not meet the requisite threshold of HSS 80.02(28).

Attorney Fees.

Attorney fees may be awarded "upon a showing of ability to pay, need, and reasonableness." ***Bisone***, 165 Wis.2d at 124, 477 N.W.2d at 62. The trial court considered all of these factors, stating:

> From the outset, there has been a serious imbalance in litigation resources in this case. The respondent has used his separate, substantial assets to litigate at will …. The petitioner has no funds from which to pay attorney fees and the respondent has substantial funds for that purpose …. The attorney fees incurred by the petitioner are fair, reasonable and necessary under the circumstances.

We conclude that the trial court properly exercised its discretion in accordance with the correct legal standards and the facts of record. Therefore, we do not disturb the award.

CONCLUSION

Charles was afforded an opportunity to be heard on his motion to modify placement. He chose mediation rather than presenting evidence at the hearing. He was offered a second hearing, if he had information in addition to that which the trial court had already heard. He did not pursue that opportunity. Thereafter, the court made its placement decision based on the information it had before it. We conclude that the trial court properly exercised its discretion. Additionally, the child support and attorney fee awards were appropriate exercises of the court's discretion and we affirm both.

By the Court – Order affirmed.

Recommended for publication.