COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3161

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

IN RE THE MARRIAGE OF:

MARVIN G. BARTHOLF,

PETITIONER-RESPONDENT,

v.

RITA J. BARTHOLF,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Rita J. Bartholf appeals an order transferring primary physical placement and legal custody of the parties' son to her former husband, Marvin G. Bartholf. Rita contends that the trial court made inadequate

factual findings and failed to apply the proper legal standards to this matter. The record evidence fails to support her claims of error. We affirm.

¶2 Rita and Marvin were divorced in 1992 after nine years of marriage. The parties entered into a marital settlement agreement regarding the issues of custody and placement that was incorporated into the judgment of divorce. The agreement provided that the parties would share joint legal custody of their two children and that primary physical placement would be with Rita. In December 1998, Marvin moved the trial court to modify primary physical placement and legal custody of the children. Before the hearing, the parties agreed to transfer primary placement of the parties' daughter, Nichole, to Marvin. Accordingly, the order from which Rita appeals pertains only to the placement and custody of the parties' son, John, who was eight years old at the time of the hearing. Following a two-day hearing, the trial court entered an order awarding primary physical placement and sole legal custody of John to his father.

¶3 Rita contends that the trial court erroneously exercised its discretion because it did not make an explicit finding with respect to whether a substantial change of circumstances had occurred pursuant to WIS. STAT. § 767.325(1)(b) (1997-98).[1] She further argues that the record does not support a finding that a substantial change of circumstances occurred or that the transfer was in the best interest of the child. Therefore, according to Rita, the court erroneously exercised its discretion in transferring primary placement and legal custody of John to Marvin.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶4 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. *See* ***Kerkvliet v. Kerkvliet***, 166 Wis. 2d 930, 938-39, 480 N.W.2d 823 (Ct. App. 1992). Our task as the reviewing court is to search the record for reasons to sustain the trial court's exercise of discretion. *See* ***Brandt v. Witzling***, 98 Wis. 2d 613, 619, 297 N.W.2d 833 (1980). However, when the contention is that the trial court erroneously exercised its discretion because it applied an incorrect legal standard, we review that issue of law de novo. *See* ***Kerkvliet***, 166 Wis. 2d at 939.

¶5 WISCONSIN STAT. § 767.325(1) sets forth the standard for modification of legal custody and physical placement in this case. A trial court may modify the order of legal custody or physical placement if the court finds that the modification is in the best interest of the child and that there has been a substantial change of circumstances since the entry of the last custody or placement order. *See* § 767.325(1)(b)1a, b. A rebuttable presumption exists that "[c]ontinuing the current allocation of decision making under a legal custody order is in the best interest of the child" and "[c]ontinuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child." Sec. 767.325(1)(b)2a, b.

¶6 Whether a substantial change of circumstances has occurred is a legal question. *See, e.g.,* ***Harris v. Harris***, 141 Wis. 2d 569, 574, 415 N.W.2d 586 (Ct. App. 1987). The term "substantial change of circumstances" requires that the facts on which the prior order was based differ from the present facts, and the difference is enough to justify the court's considering whether to modify the order. *See* ***Delchambre v. Delchambre***, 86 Wis. 2d 538, 539, 273 N.W.2d 301 (1979); ***Licary v. Licary***, 168 Wis. 2d 686, 484 N.W.2d 371 (Ct. App. 1992). We will uphold the trial court's order if we can conclude that there are facts of record

which support a finding of a substantial change of circumstances that would justify a custody change based on the best interest of the child. *See* ***Delchambre***, 86 Wis. 2d at 541.

¶7 As an initial matter, Rita questions whether the trial court can make a finding of changed circumstances since the original placement was decided pursuant to a marital settlement agreement. However, testimony elicited at the modification hearing sheds light on the different facts existing at the time of the original custody and placement determination. Both parties agreed to the original placement arrangement at least in part because Rita retained the homestead following the parties' divorce. Marvin testified that the parties then agreed that it would be better for the children to "stay in the house at that time and go to school without being interrupted."

¶8 Rita also argues that the trial court employed an incorrect legal standard because it did not make an explicit finding that a substantial change of circumstances had occurred and that the record does not support such a finding. Counsel for both parties addressed the legal standard governing custody modification at the commencement of the modification hearing, and the record evidence supports a finding that a substantial change of circumstances has occurred since the date of the original placement order. Rita lost the home in a foreclosure action less than two years after the divorce, and she and the children have moved several times. Shortly after the divorce, Rita became involved with a man whose alcohol-related problems eventually led her to seek a restraining order against him. Rita now resides with her boyfriend of several years, Randy Bash. Randy, who has a prior felony conviction for burglary, has been physically abusive to Rita. On one occasion, Randy broke Rita's ankle during an altercation that occurred while Rita was acting as an in-home day care provider. John was in

the home and knew what Randy had done to his mother. Randy was convicted of disorderly conduct in connection with that assault and the children's guardian ad litem temporarily removed the children from the home. On another occasion, Rita removed the children from school and sought refuge at a women's crisis center, expressing fear of Randy.

¶9 The social worker assigned by the family court to conduct a custody and placement study recommended that primary physical placement and sole legal custody of John be transferred to his father. She concluded that Rita was a good parent in terms of her love for the children and in providing for them. However, she expressed concern about the nature of the relationship between Rita and Randy and the adverse effect of the violence and verbal conflict between Rita and Randy on the children in the home. In her report and at trial, the social worker stated that John had told her that he was afraid of Randy. She characterized the atmosphere in Rita's home as one of "intimidation." She also indicated that she thought John and his sister should be reunited because they had a close relationship despite the eight-year difference in their ages. The guardian ad litem also recommended a modification in placement and a transfer of legal custody to Marvin based on his own investigation and the testimony elicited at the modification hearings. This court finds that the record evidence is sufficient to establish that a substantial change of circumstances has occurred since the initial custody and placement agreement.

¶10 Placement of a minor child must also be consistent with his or her best interest. *See* WIS. STAT. §§ 767.24(5), 767.325. The determination of what is in a child's best interest is a mixed question of law and fact. *See* ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992). The trial court, as the finder of fact, is entitled to judge the credibility of the witnesses and we are

required to give due regard to the opportunity of the trial court to judge such a matter. *See* ***Hughes v. Hughes***, 148 Wis. 2d 167, 171, 434 N.W.2d 813 (Ct. App. 1988). We will not disturb the trial court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). The exercise of discretion requires that the trial court consider the facts of record in light of the applicable law to reach a reasoned and reasonable decision. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). We will not upset the trial court's exercise of discretion unless it clearly misused that discretion. *See* ***Bohms v. Bohms***, 144 Wis. 2d 490, 496, 424 N.W.2d 408 (1988).

¶11 Here, using the criteria set forth in WIS. STAT. § 767.24(5), the trial court made detailed findings with respect to whether a modification of legal custody and physical placement was in John's best interest. In addition to the evidence outlined above, the court made findings regarding testimony from Rita and Marvin, as well as from Marvin's wife Debra, Randy, and Rita's brother and sister. This court rejects Rita's contention that the trial court "ignored" evidence regarding Marvin. The record indicates that the trial court considered the evidence and made specific findings regarding Marvin, his relationship with his wife, and the atmosphere in his home. The court heard extensive testimony regarding the conflicts that occurred between Marvin and Rita, both during their marriage and afterward, and noted the existence of a current domestic abuse injunction limiting contact between the parties. Indeed, the social worker and the guardian ad litem both indicated that the on-going conflict between the parties and their evident inability to cooperate influenced their respective recommendations that sole legal custody be transferred to Marvin. The court also made findings regarding Marvin's relationship with the parties' daughter, Nichole, his work schedule, and the likely impact on John of a transfer of physical placement. Indeed, in her oral

ruling at the close of the hearing, the court itemized and evaluated each of the factors set forth in § 767.24(5).

¶12 WISCONSIN STAT. § 767.325(1)(b)2 also creates a rebuttable presumption that continuing the current physical placement and legal custody arrangement is in the best interest of the child. Rita asserts that the trial court erroneously failed to consider this presumption. The record reflects that the trial court did consider the statutory presumption in making its findings. The court observed: "What John is lacking is stability. Where that can be best provided is in his father's home. I say that knowing that I have no desire to move – remove an eight year old from his mother, especially when she has been the custodial parent all this time." We conclude that the trial court did not err in finding that a change in legal custody and primary physical placement would be in the best interest of the child.

¶13 The record reflects a substantial change of circumstances with regard to the welfare of the child and supports the trial court's finding that a transfer of primary physical placement and legal custody was in the best interest of the child. We affirm the trial court's order transferring primary physical placement and sole legal custody of John to his father.

By the Court.—Order affirmed.

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