COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0732 **Cir. Ct. No. 01FA000144**

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

IN RE THE MARRIAGE OF:

PEGGY SUE PODOLAK,

PETITIONER-APPELLANT,

V.

JOHN PETER PODOLAK,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Peggy Podolak appeals a judgment of divorce from John Podolak. She argues the trial court erroneously exercised its discretion by

granting John the child tax exemption awarding her maintenance at $450 per month, and awarding primary placement of their minor daughter to John. We agree with Peggy regarding the tax exemption, but affirm the maintenance and primary placement awards.

BACKGROUND

¶2 Peggy and John were married on May 5, 1979, and lived together in Gilman until the commencement of the divorce action on December 14, 2001. They have three children, but only one of them is a minor.

¶3 John is a seasonal construction worker who is generally employed from April or May through October or November. He works extremely long hours during this time period, and usually must travel great distances to get to work sites. While John is the primary provider for the family, Peggy has been the homemaker and the primary caregiver for the children. She was never employed full time during the marriage, but has recently worked part time as an emergency medical technician.

¶4 At trial, the court awarded Peggy and John joint custody of their minor daughter, with John having primary physical placement. Peggy was ordered to pay $236 in child support per month, based on an imputed wage of $8 an hour, and John was ordered to pay $450 maintenance per month for a term of four years. The trial court also awarded John the child income tax exemption. Peggy appeals.

DISCUSSION

¶5 Peggy first claims the trial court erroneously exercised its discretion by awarding John the child tax exemption. The trial court's decision to award a

child tax exemption is a discretionary one. ***Sommerfield v. Sommerfield***, 154 Wis. 2d 840, 850, 454 N.W.2d 55 (Ct. App. 1990). A trial court's discretionary decision will be sustained by this court when the trial court has 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. ***Sharon v. Sharon***, 178 Wis. 2d 481, 488, 504 N.W.2d 415 (Ct. App. 1993). However, in cases where the trial court has failed to set forth its reasons, we may examine the record to determine if there exists a reasonable basis for the trial court's decision. ***McCleary v. State***, 49 Wis. 2d 263, 277-78, 182 N.W.2d 512 (1971).

¶6 Here, the parties did not agree who would receive the tax exemption. Thus, the matter was left to the trial court's discretion. WIS. STAT. § 767.25(1)(b). The trial court decided to award the exemption to John without explanation, and the record does not provide a reasonable basis for the trial court's decision. Peggy testified that if she was awarded primary placement and was allowed to move to Montana to live with her boyfriend, she would stipulate to awarding the exemption to John. If she was not awarded primary placement, she indicated the exemption ought to be alternated yearly. John testified the tax exemption should be alternated yearly regardless of placement. We can only speculate as to why the trial court awarded the tax exemption solely to John based on this record. Accordingly, we reverse this portion of the judgment and remand the matter to the trial court to reexamine the tax exemption issue.

¶7 Peggy next claims the trial court erroneously exercised its discretion by awarding her limited maintenance payments of only $450 per month.[1] "This court will not disturb the circuit court's award of maintenance unless the award constitutes an erroneous exercise of discretion." ***King v. King***, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999). Based on the record, we conclude the trial court properly exercised its discretion.

¶8 The trial court awarded $450 maintenance per month based on Peggy's alternate assumption figures she submitted to the court. This decision was not erroneous for two reasons. First, Peggy conceded that $450 per month was an insufficient amount to equalize income, but believed her proposal was fair based on her needs should she live in Montana. Second, Peggy conceded she could meet her needs on less than $450 were she to live in Montana.

¶9 Peggy claims that should she live in Wisconsin, she needs anywhere from $600-$1,000 per month. However, when the trial court set maintenance at $450, it assumed Peggy would be moving to Montana after the marriage was dissolved. This was a reasonable assumption. Peggy testified it was her preference to live in Montana due to reduced living expenses and because she wanted to get as far away from John as possible. Peggy indicated she would stay in Wisconsin only if she received primary placement of their daughter, and then only if she was ordered to stay within a set mileage of John. However, the trial

[1] Peggy does not argue the duration of the maintenance payments is erroneous. Therefore, we do not address this aspect of the maintenance award. *See* ***Reiman Ass'n v. R/A Adver.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (1981).

court did not award her primary placement of their child.[2] Given Peggy's expressed preference to move to Montana, and her willingness to stay in Wisconsin only if awarded primary placement of their daughter, the court was entitled to assume she would relocate to Montana.

¶10 Peggy further argues her proposed maintenance of $450 per month assumed she would have primary placement of their daughter and would be receiving a substantial amount of child support. However, the court awarded primary placement with John; thus, Peggy will not have the child-related expenses she anticipated. Furthermore, given her concession that she could meet her expenses with less than $450, we cannot say this amount is unfair.

¶11 Finally, Peggy claims the trial court erred by granting primary placement of their daughter with John. Decisions on physical placement are committed to the trial court's discretion. ***Koeller v. Koeller***, 195 Wis. 2d 660, 663, 536 N.W.2d 216 (Ct. App. 1995). We affirm the trial court's decision if the court properly exercised its discretion. ***Jocius v. Jocius***, 218 Wis. 2d 103, 110-11, 580 N.W.2d 708 (Ct. App. 1998). A court properly exercised discretion where it applied the correct law to the facts of record, and, employing a logical rationale, reached a reasonable result. ***Id.*** The weight to be given testimony as well as the credibility of witnesses is for the trial court acting as the trier of fact to decide. ***Gardner v. Gardner***, 190 Wis. 2d 216, 230, 527 N.W.2d 701 (Ct. App. 1994);

[2] The trial court concluded it could not order a parent to live in a certain area, regardless of placement. The court acknowledged that if a parent who has primary placement wants to move more than 150 miles from the place of primary placement, the parent has to get court approval to take the child, not to make the move. *See* WIS. STAT. § 767.327. The court concluded this statute did not afford it the power to order where the parent could initially reside. Peggy has not appealed this conclusion.

Wiederholt v. Fischer, 169 Wis. 2d 524, 533, 485 N.W.2d 442 (Ct. App. 1992). We will not set aside the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶12 The trial court's primary consideration in a primary placement decision is the best interests of the child. *See* WIS. STAT. § 767.24(5).[3]

[3] WISCONSIN STAT. § 767.24(5) states:

> FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS. In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian. The court shall consider the following factors in making its determination:
>
> (a) The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
>
> (b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
>
> (c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
>
> (cm) The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.
>
> (d) The child's adjustment to the home, school, religion and community.
>
> (dm) The age of the child and the child's developmental and educational needs at different ages.
>
> (e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.

(continued)

Ultimately, the court found that awarding John primary placement served their child's best interests. This was a reasonable exercise of discretion.

¶13 The trial court properly began its analysis by stating it could not prefer one parent over another based on gender. *See* WIS. STAT. § 767.24(5). The court noted both Peggy and John desired primary physical placement of their

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> (em) The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.
>
> (f) The availability of public or private child care services.
>
> (fm) The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.
>
> (g) Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.
>
> (h) Whether there is evidence that a party engaged in abuse, as defined in s. 813.122(1)(a), of the child, as defined in s. 48.02(2).
>
> (i) Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20(1m) or domestic abuse as defined in s. 813.12(1)(am).
>
> (j) Whether either party has or had a significant problem with alcohol or drug abuse.
>
> (jm) The reports of appropriate professionals if admitted into evidence.
>
> (k) Such other factors as the court may in each individual case determine to be relevant.

daughter, but that their child wished to reside with Peggy.[4] The court observed, though, that their child did not want to move to Montana, and that Peggy had made it quite clear it was her preference to move there. Peggy testified she would remain in Wisconsin only if awarded primary placement of their daughter and ordered to remain in Wisconsin. Additionally, the guardian ad litem recommended their child be placed with Peggy, provided she was restrained from moving to Montana.

¶14 Regarding the interaction of their daughter with the parents, the court agreed she had a closer relationship with Peggy, but that her entire family resided in or around the village of Gilman. There were no close family members in Montana. The court also agreed that the child had spent the greatest amount of time with Peggy in the past and that she was the primary caregiver, mostly because John was the primary provider and worked very long hours. The court observed, however, that John was willing to make significant changes in his work schedule should he receive primary placement so that he could spend more time with their daughter.

¶15 With regard to the adjustment in the home, school, church, and the community, the court found their child would have none of these anchors in Montana. As to the age and development of their child, the court acknowledged she was thirteen years old and is at the dawn of development into womanhood, but concluded this fact was irrelevant because it had the appearance of favoring one

[4] Peggy claims that John's testimony, when considered in its entirety, establishes that he thought primary placement should be with Peggy. We do not agree. John testified that primary placement with Peggy was preferable, provided she did not reside with her boyfriend. However, John also stated he believed it was unlikely Peggy would live without her boyfriend.

parent over another based on gender. The court found both parents were equally capable of guiding their daughter through this stage in her life. Further, Peggy's, John's and the child's mental and physical health were fine.

¶16 The court then considered how best to achieve regularly occurring and meaningful periods of placement. It noted that if primary placement was awarded to Peggy during the year, the child could not have regularly occurring and meaningful periods of placement with John because of his intense summer work schedule. Because John was a seasonal worker who earned his living primarily in the summer, it would make little sense to award primary placement to Peggy during the school year and then give John placement during the summertime.

¶17 With respect to the cooperation and communication between John and Peggy, the court found it was poor. The court was troubled by the fact that Peggy had an injunction against John. Moreover, the court perceived Peggy had a "pronounced discomfort" with John, and that this could infect their daughter's relationship with him. The court stated it did not sense that John had any discomfort with Peggy. The court was concerned Peggy may not encourage or assist their daughter's relationship with John.

¶18 Finally, the court found there was no issue regarding spousal or child abuse, or with respect to alcohol or substance abuse. The court also acknowledged that aside from the guardian ad litem's recommendation, no other professional reports or recommendations had been made.

¶19 None of the factual findings the trial court relied upon was clearly erroneous. After consideration of all these factors, the court reasoned their child's best interests were served by being primarily placed with John. This was a reasonable exercise of discretion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded. No costs to either party.

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