COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1805 **Cir. Ct. No. 2001FA439**

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

IN RE THE MARRIAGE OF:

DAVID V. STRAUB,

PETITIONER-RESPONDENT,

V.

SHAWN K. STRAUB,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed*.

Before Deininger, P.J., Vergeront and Higginbotham, JJ.

¶1 DEININGER, P.J. Shawn Straub appeals the custody and placement provisions in a judgment of divorce that ended her marriage to David Straub. She also appeals an order that denied reconsideration of those

provisions. She claims the trial court erroneously exercised its discretion by awarding joint custody and equally shared placement of the parties' two children. Specifically, Shawn claims the court applied an incorrect legal standard by failing to give effect to the rebuttable presumption that "[t]he parties will not be able to cooperate in the future decision making required" for joint legal custody when there is evidence "of interspousal battery … or domestic abuse." *See* WIS. STAT. § 767.24(2)(b)2.c.(2003-04).[1] Shawn also claims the trial court erred "by presuming that the parents should share placement equally," by failing "to understand the significance and dynamics of domestic violence in custody and placement disputes," and by "trivializ[ing]" the issue of domestic violence.

¶2 Our review of the record satisfies us that the trial court did not err in determining that David had succeeded in rebutting the statutory presumption. We further conclude that the record amply supports the court's determination that the best interest of the children would be served by an order for joint legal custody and equal placement. Thus, the trial court did not erroneously exercise its discretion and we affirm the appealed judgment and order.

BACKGROUND

¶3 The parties were married in October 1999. David petitioned for a divorce in November 2001. David and Shawn have two children, a boy who was four at the time of the divorce and a girl who was then two years old. Custody and placement of the children were disputed, and the issues were tried to the court over three days in December 2003 and January 2004.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 David asked the court to follow the recommendation of the custody evaluation prepared by the Dodge County Family Court Counseling Service (FCCS), which was joined in by the guardian ad litem for the children. The FCCS recommendation was for joint legal custody and that the parties share placement of the children "on an equal basis to maximize the time the children spend with each parent." The recommendation included specific days and times to effect the shared placement.

¶5 Shawn requested the court to award her sole custody "until such time as the parties can stipulate or the court finds that David has been treated for domestic abuse" by a "certified treatment provider." She also requested that David be "evaluated and treated for domestic abuse … by a certified treatment provider such as someone listed by the Wisconsin Batterers Treatment Providers Association, or with equivalent training and experience." As for placement or visitation with David, Shawn requested that it be limited to "evening placements on Wednesdays and afternoon placement on alternating Saturdays," with supervision "by a friend, relative, or neighbor who assures that the children will not be physically endangered."

¶6 At the conclusion of the third day of the divorce trial, the court issued a ruling from the bench. The court ordered joint legal custody with placement to be shared on an equal basis, as recommended in the FCCS evaluation. Shawn moved the trial court for a stay of the custody and placement provisions pending appeal. The court denied the motion for a stay, as well as denying reconsideration of its custody and placement decision. The court entered

findings of fact, conclusions of law and a judgment of divorce, as well as an order denying reconsideration and a stay. Shawn appeals.[2]

ANALYSIS

¶7 Legal custody determinations are committed to the trial court's discretion, and we sustain them on appeal when the court exercises its discretion based on the correct law and the facts of record, and employs a logical rationale in arriving at its decision. *See* ***Koeller v. Koeller***, 195 Wis. 2d 660, 663-64, 536 N.W.2d 216 (Ct. App. 1995). The same standard applies to a trial court's allocation of physical placement of a child between divorced or separated parents. *See* ***Culligan v. Cindric***, 2003 WI App 180, ¶7, 266 Wis. 2d 534, 669 N.W.2d 175.

¶8 Properly exercised discretion involves "a statement on the record of the trial court's reasoned application of the appropriate legal standard to the relevant facts of the case." ***Earl v. Gulf & W. Mfg. Co.***, 123 Wis. 2d 200, 204-05, 366 N.W.2d 160 (Ct. App. 1985). If the circuit court does not fully explicate its reasoning, we may "examine the record to determine whether the facts support" its decision. ***Id***. at 205. A court erroneously exercises its discretion, however, if it bases its decision on an error of law. ***Id***. We determine de novo whether the

[2] Shawn filed her notice of appeal on June 30, 2004. She did not move this court for a stay of the appealed judgment and order, however, until September 24th. After reviewing the parties' submissions on the stay motion, as well as the record of the trial court's decision to deny a stay, we concluded that Shawn had not made the necessary showing for obtaining a stay pending appeal in view of the trial court's refusal to grant such relief. *See* ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). We explained in our November 8, 2004 order that, among other things, Shawn had failed to demonstrate irreparable injury from the continuation of a custody and placement order that had then "been in effect for over nine months." We noted that Shawn's "substantial[] delay[] in bringing her motion to this court … undermines her claim of irreparable injury."

circuit court applied the correct law in arriving at a discretionary decision. *See* ***Paige K.B. v. Steven G.B.,*** 226 Wis. 2d 210, 225, 594 N.W.2d 370 (1999).

¶9 Shawn claims the trial court committed an error of law by "failing to apply" the rebuttable presumption established by WIS. STAT. § 767.24(2)(b)2.c., which provides, in relevant part, as follows:

> [T]he court may give sole legal custody only if it finds that doing so is in the child's best interest and that … the following applies:
>
> …
>
> 2. The parties do not agree to sole legal custody with the same party, but at least one party requests sole legal custody and the court specifically finds … :
>
> …
>
> c. The parties will not be able to cooperate in the future decision making required under an award of joint legal custody. In making this finding the court shall consider, along with any other pertinent items, any reasons offered by a party objecting to joint legal custody. *Evidence … of interspousal battery … or domestic abuse … creates a rebuttable presumption that the parties will not be able to cooperate in the future decision making required.*

Id. (emphasis added).[3]

¶10 There is no dispute that the record contains evidence of domestic abuse on David's part. In October 2001, just prior to David's filing for a divorce,

[3] There is now a second rebuttable presumption relating to domestic abuse when child custody is at issue. WISCONSIN STAT. § 767.24(2)(d)1 now provides that "it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody" to a party that has "engaged in a pattern or serious incident of interspousal battery … or domestic abuse." The new presumption, however, applies only to actions or proceedings that are commenced on or after March 13, 2004, *see* 2003 Wis. Act 130, § 43, and thus it did not apply to the custody and placement decision under review.

David shoved Shawn against a wall during an argument. Shawn also claims that he grabbed her throat, an allegation he denied. In addition to the parties' testimony, a police report regarding the incident was introduced into evidence. David was charged with domestic disorderly conduct and entered a deferral agreement with the State. The FCCS evaluation reported that "David complied with the conditions of the agreement" and that the court dismissed the case in 2003. The FCCS evaluation also reports that David met with a psychotherapist some fourteen times during the year following the incident. The therapist stated in a letter that David had "consistently" attended the sessions and that he "has his anger under control." The therapist also told the author of the FCCS evaluation that the therapist "believes David has effectively dealt with these issues and does not believe there will be any concerns of a violent nature in the future."

¶11 The trial court said in its ruling at the conclusion of the divorce trial in January 2004 that "there is no doubt in my mind, Mrs. Straub, that you have been the victim of domestic abuse." The court determined, however, that the evidence in the record of domestic abuse was not the controlling factor in its analysis:

> Has that abuse in this particular case between this man and you, has that affected this Court's opinion and has it tipped the scales of justice for me to say, you get sole custody of those children? I don't think so. I don't think so at all.

The court expressed confidence, based in part on its knowledge of their past work and experience, in the recommendations of the FCCS evaluation author and the guardian ad litem, concluding as follows:

> So[,] based upon the evidence, based upon the recommendations, taking into consideration the factors that the Court is to take into consideration under the law, the children, the parents' interests, the location, the education, religious training, and other matters that are important to

> families and their children, the Court grants joint legal custody of these children to Mrs. Straub and Mr. Straub.

¶12 Several months later, at the beginning of a hearing in June on Shawn's request for a stay, the court clarified its ruling as follows:

> I want to clarify something before we go further in this case. In looking at one or two of my comments in the transcript, I think the wrong impression might have been given, and maybe I stated it wrong.
>
> I believe that in this divorce there was some domestic inappropriate behavior, violence if you will. I also believe that because of the counseling that Mr. Straub went through, that any presumption that is made under the law, or rebuttable presumption, has in fact been rebutted. So when I said, Mr. [Shawn's counsel], you failed to meet your burden of proof, basically what I was saying is, maybe said it inappropriately, is that the presumption has been rebutted ….

¶13 Our review of the record satisfies us that the trial court did not commit an error of law by failing to apply the presumption under WIS. STAT. § 767.24(2)(b)2.c. The court's clarifying comments at the June hearing demonstrate that the court was aware of the domestic abuse evidence and of the existence of the presumption it triggered against an award of joint custody.[4] At that hearing, the court also stated its conclusion that the presumption had been rebutted.

[4] Shawn asserts that the trial court's clarification at the reconsideration hearing shows that the court was still confused about the effect of the presumption because the court concluded by saying "there isn't sufficient evidence for the Court to believe that supervised visitation was necessary." We reject this assertion. In her post-trial motion, Shawn specifically cited the presumption under WIS. STAT. § 767.25(2)(b)2.c., and she argued that "the court's stated reasons for granting joint legal custody versus sole legal custody to Shawn, for not minimizing placement, for not requiring supervised placement … clearly exhibit a misunderstanding of domestic violence and current Wisconsin laws related to custody and placement in a domestic violence situation." We read the court's clarifying remarks as being addressed to these contentions in Shawn's motion. Taken in context, the court's comments show that it was aware of the relevant statutory presumption, and further, that it concluded the presumption had been rebutted.

¶14 The record contains evidence that supports the trial court's conclusion that the presumption of WIS. STAT. § 767.24(2)(b)2.c. had been rebutted. In addition to the information in the FCCS evaluation addressing the October 2001 incident and David's treatment that followed it, David testified that Shawn's allegations regarding the October 2001 incident were exaggerated. The police report of the incident could be read to suggest the same. The psychotherapist who met with the parties following the October 2001 incident reported to the FCCS evaluation author that "based on meeting with Shawn alone and Shawn and David together, I believe Shawn is extremely focused on how she has been hurt, and I am concerned that her belief may be that David needs to hurt as well." The therapist also expressed a concern to the author regarding Shawn's "potential for irrational thinking and possible attempts of revenge by Shawn through the children."

¶15 The children's guardian ad litem told the court, "[t]he domestic abuse … isn't the be-all and end-all of this case," noting that what Shawn was requesting would be a "drastic change" from the placement schedule the parties had observed through much of the pendency of the divorce. She also noted David's compliance with the requirements of the deferral agreement following the 2001 incident, and told the court, "[b]ottom line, I'm asking the Court to order joint legal custody." In short, the trial court's conclusion that the presumption of WIS. STAT. § 767.24(2)(b)2.c. had been overcome was not unreasonable based on the record before it.

¶16 A second error of law that Shawn contends the trial court committed is that the court "clearly appears to have applied a presumption in favor of equal placement." We agree with Shawn that there is no statutory presumption regarding equal placement similar to the one in favor of joint legal custody. *See*

Keller v. Keller, 2002 WI App 161, ¶12, 256 Wis. 2d 401, 647 N.W.2d 426. However, we find nothing in the court's ruling to indicate that it believed a presumption in favor of equal placement existed.

¶17 Shawn suggests that remarks the trial court made during the direct examination of her principal expert witness demonstrate the court's misunderstanding on this topic. Shawn provides no record citations to these remarks. *See* WIS. STAT. Rule 809.19(1)(e) (requiring "citations to the … parts of the record relied on" in argument in appellate briefs). We have reviewed all fifty-six transcript pages covering the identified expert's direct examination, as well as some seventy pages of cross-examination, questioning of the witness by the guardian ad litem and re-direct examination. We find nothing the court said during the testimony in question that even approximates Shawn's characterization that the court mistook the statutory presumption in favor of joint legal custody as one applying as well to equal placement.[5]

¶18 Having concluded that the trial court did not commit the legal errors Shawn asserts, we next consider whether support exists in the record for the court's custody and placement rulings. We conclude that there is ample support in the present record for the trial court's determinations.

[5] The remarks that Shawn intended to refer to were perhaps those made by the court during the testimony of another witness, who was a domestic violence coordinator at a local hospital. During that witness's testimony, the court noted the existence of the statutory presumption in favor of joint custody. *See* WIS. STAT. § 767.24(2)(am). The court went on to note Shawn's proposal for limited and supervised visitation by David and speculated that it would result in his losing contact and a meaningful relationship with the children. We find nothing in these comments by the court, however, to indicate that it believed there was a statutory presumption in favor of equally-shared placement for the children.

¶19 We have already noted that the FCCS evaluation recommended joint custody and equally-shared placement and that the guardian ad litem advocated for that disposition. The twenty-two page FCCS custody evaluation, in addition to providing background facts regarding the parties and their marriage, as well as summarizing the author's contacts with various treatment providers and personal references, discussed each of the custody factors set forth in WIS. STAT. § 767.24(5). The evaluation specifically addresses the October 2001 domestic abuse incident, noting that there was no dispute that it happened and that domestic abuse is among the statutory factors that must be considered in custody and placement determinations. The author concludes, however, that it was "an isolated incident" and that "the future threat of violence in this case is extremely minimal."

¶20 The FCCS author also expressed significant concerns regarding Shawn's parenting. Specifically, the author stated, "I do not believe that her choices and decisions are always in the best interest of her children," noting that even while "under the scrutiny of the Court and an evaluation," she met a man on the internet and shortly thereafter moved in with him. The report also notes that Shawn moved the children further from David, lied to the report author and guardian ad litem about moving, and "never informed David where his children were." The author of the report met with both parties and the children and observed the interactions among family members. He testified at trial and was subject to extensive cross-examination by Shawn's counsel.

¶21 A psychiatrist who had treated David following the incident in October 2001 testified that David had been "very remorseful" and was strongly motivated to avoid similar incidents in the future. The doctor testified that he had met with David approximately six times, once or twice with Shawn present, and

possibly once with Shawn alone, although Shawn disputed meeting with him individually. He stated his opinion that David did not pose a "threat to anyone."

¶22 Shawn presented the testimony of two experts on the issue of domestic abuse. The first held a doctorate in clinical social work and specialized in issues relating to domestic violence. He provided a written report of his evaluation of Shawn as a victim of domestic abuse. In conducting his evaluation and preparing his report, the expert met with Shawn but not with either David or the children. He expressed concern regarding David's continued "access to Shawn through their child[ren]" and recommended that David undergo "a credible abuser treatment program." He also urged the court to carefully consider the impact of domestic violence on the children when determining custody, placement and visitation arrangements. The expert acknowledged on cross-examination, however, that he had not interviewed the children or observed their interaction with David. He was also asked the following question: "So your recommendation to this judge in this case regarding this family … is based upon generalized studies you have read and has nothing to do with personal, in-depth investigation regarding this family, these children; correct?" He replied, "That's correct."

¶23 Shawn's second expert, a "domestic violence coordinator" at a local hospital, assessed Shawn in May 2002. The witness had one brief phone contact with David and had seen the children. This witness recommended in a May 2002 report that David have only supervised visitation "until it was assessed that he could deal with a two-year-old and a five-month-old's behaviors, without making bad choices." She repeated the recommendation for supervised visitation at trial but made no recommendations specifically regarding legal custody or the allocation of the children's physical placement. In questioning by the guardian ad litem, the witness acknowledged that the sole basis for her recommendation

was information she received from Shawn. This witness, like Shawn's principal expert, expressed concern that David had been evaluated and treated regarding the domestic abuse incident by persons who were not specially certified in domestic violence and abuse.

¶24 In the preceding paragraphs, we have largely highlighted evidence and trial testimony that supports the trial court's discretionary decision, not evidence that might arguably point to a different result. That is in keeping with our proper role as a reviewing court: "Generally, we will look for reasons to sustain a circuit court's discretionary decision." ***Schauer v. DeNeveu Homeowners Ass'n, Inc.***, 194 Wis. 2d 62, 71, 533 N.W.2d 470 (1995). It is the trial court's role, not ours, to assess the weight and credibility of the evidence the parties presented at trial, including the testimony and reports of experts. *See* ***Siker v. Siker***, 225 Wis. 2d 522, 527-528, 593 N.W.2d 830 (Ct. App. 1999). We conclude the trial court could reasonably choose on the record before it to credit and accept the recommendation of the FCCS evaluation for joint custody and equal placement.

¶25 Shawn devotes considerable emphasis in her opening brief to claims that, in its custody and placement ruling, the trial court "trivialized" the domestic abuse issue and failed to grasp the dynamics of domestic abuse and how it impacts (or should impact) on custody and placement decisions.[6] We share Shawn's

[6] We have also reviewed the amicus brief submitted by the Wisconsin Coalition Against Domestic Violence which makes similar claims. The Coalition provides extensive information on the topic of domestic abuse and convincingly argues that there "is a need for specialized training about domestic violence for judges." Nothing in the Coalition's brief, however, persuades us that the trial court erroneously exercised its discretion in entering the custody and placement order it did on the basis of the present record.

consternation with some of the comments the court made in its bench decision, as well as several it made during the course of the trial. These types of digressions and decidedly non-judicial observations do not engender confidence in the parties, or in a reviewing court, that the trial court reached a proper decision on the basis of the facts before it and the applicable law. Despite these distractions, however, we conclude the ruling before us must be affirmed for the reasons discussed above. Although certain of the court's comments from the bench were both unnecessary and unhelpful, they do not provide grounds for setting aside an otherwise affirmable result.

CONCLUSION

¶26 For the reasons discussed above, we affirm the appealed judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.