

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 3, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2012AP2260

Cir. Ct. No. 2008PA21PJ

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE PATERNITY OF J. R. G.:

STATE OF WISCONSIN,

PETITIONER,

SHARALANEE M. TAYLOR STAPLES,

PETITIONER-RESPONDENT,

v.

DARIN R. GUTTING,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Burnett County:
KENNETH L. KUTZ, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Darin Gutting appeals a physical placement order, arguing the circuit court erroneously exercised its discretion by awarding shared placement and incorrectly applying a presumption of equal placement. We disagree and affirm.

¶2 On August 10, 2008, a child was born to Gutting and Sharalane Staples. A stipulation and order for support was executed on September 5, 2008, granting the parties joint custody and reserving a determination of primary placement, among other things. On September 18, 2009, a temporary order awarded the parties shared placement based on their stipulation.

¶3 On January 26, 2012, Gutting moved for primary placement, and subsequently on February 24 for drug testing, due to concerns of Staples' drug use. The circuit court continued the existing shared placement arrangement. Gutting now appeals.

¶4 Physical placement determinations are committed to the sound discretion of the circuit court. See *Bohms v. Bohms*, 144 Wis. 2d 490, 496, 424 N.W.2d 408 (1988). The exercise of discretion requires that the circuit court consider the facts of record in light of the applicable law to reach a reasoned decision. See *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). We will not upset the circuit court's exercise of discretion unless it clearly misused that discretion. See *Bohms*, 144 Wis. 2d at 496.

¶5 The court is to consider the applicable factors set forth in WIS. STAT. § 767.41(5)¹ when issuing an order concerning physical placement of a child.

¹ References to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Gutting argues the circuit court erroneously focused on a single statutory factor: whether either party has or had a significant problem with alcohol or drug abuse. *See* WIS. STAT. § 767.41(5)(am)14. Gutting contends the court failed to provide adequate reasoning “as to what constituted the child’s best interest.”

¶6 Here, we are satisfied the circuit court considered the factors required by the statute to be considered. The court stated:

The factors that a Court has to consider in deciding this particular issue are spelled out in Section 767.41(5) of the Wisconsin Statutes. By and large I think most of the factors that are listed there either are split equally between the parties or basically aren’t applicable.

The primary one I think which the hearing today has focused on for the most part is the one that’s spelled out in [subdivision 14], which is whether there’s evidence of alcohol or drug abuse in this case. And I think the record here has clearly established that there is.

....

But as I pointed out, and I think [the guardian ad litem] acknowledges this, the one thing that hasn’t been shown here [is] the effect, if any, to which her substance abuse problems are impacting her ability to be a mother to [the child].

....

And at this point, despite the fact that Ms. Staples clearly has a substance abuse problem, I haven’t seen or heard anything throughout the course of this hearing that has shown that her substance abuse problem has a cause-and-effect relationship on her ability to be a mother to [the child].

¶7 Consistent with the guardian ad litem’s recommendation that it would be in the best interests of the child, the court continued the existing shared placement. The court also admonished Staples concerning future drug use, and ordered drug testing as a condition of shared placement. Quite simply, despite

expressing certain reservations, the court did not find that Staples should be stripped of placement at this point in time.

¶8 Gutting insists the circuit court erroneously believed there was a statutory presumption in favor of equal placement. Gutting's analysis is incorrect. The court properly viewed this case as a de novo review of a long-standing temporary shared placement order, and set a placement schedule that allowed the child to have regularly occurring, meaningful periods of placement with each parent under WIS. STAT. § 767.41(4)(a)2. Pursuant to paragraph (4)(b), the court also found that shared placement would not endanger the child's physical, mental or emotional health. The court's findings were not clearly erroneous. *See* WIS. STAT. § 805.17(2). Moreover, the court did not merely equate the lack of physical, mental or emotional harm with the child's best interest, as Gutting perceives.

¶9 Although a different court may have come to a different conclusion given the evidence concerning Staples' use of drugs, the court in this case employed a process of reasoning based upon relevant facts, and reached a reasoned conclusion. The record demonstrates that the court incorporated appropriate considerations and properly exercised its discretion in maintaining the existing shared placement.

By the Court.—Order affirmed.

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

