COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 2016

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. 2015AP221 **Cir. Ct. No. 2006FA93**

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

IN RE THE MARRIAGE OF:

JENNIFER LYNN SMITH,

PETITIONER-APPELLANT,

V.

DALE JAMES LANTZ,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Jennifer Smith appeals an order denying her motion to modify physical placement and child support for the minor children she

shares with her ex-husband, Dale Lantz. Smith contends the circuit court erred by denying the motions. We reject Smith's arguments and affirm the order.

BACKGROUND

¶2 Lantz and Smith divorced in July 2008. Pursuant to a marital settlement agreement that was incorporated by reference into the divorce judgment, the parties shared joint legal custody of their minor children, Dylan (born in 2001) and Mackenzie (born in 2003). Primary physical placement during the school year was granted to Lantz utilizing the following schedule:

> Lantz shall have primary placement, with [Smith] having periods of physical placement every other weekend from Friday immediately after school to Sunday at 5:00 p.m. In addition, [Smith] shall have placement of the children every Wednesday from after school until 8:00 p.m. and at such other times as the parties may agree, by text message or in writing.

The marital settlement agreement provided for equal division of placement during holidays and over the summer, when the parties alternated weekend placement (Friday, Saturday and Sunday) as well as Monday/Tuesday and Wednesday/Thursday placement.

¶3 In July 2014, Smith filed the motion to change physical placement, seeking primary physical placement of Mackenzie. Smith also filed a derivative motion to reduce her child support payments to Lantz. At a motion hearing, Smith sought primary physical placement of both children. After hearing testimony from Smith, Lantz, and Dylan's school counselor, along with the guardian ad litem's recommendation, the circuit court denied Smith's motions but altered the summer placement schedule to accommodate Dylan's summer school schedule. This appeal follows.

DISCUSSION

¶4 As an initial matter, Smith urges this court to review this matter "de novo" based on affidavits and other evidence that were not before the circuit court. Whether to modify a custody or physical placement order, however, is directed to the circuit court's sound discretion. ***Keller v. Keller***, 2002 WI App 161, ¶6, 256 Wis. 2d 401, 647 N.W.2d 426. We affirm a circuit court's discretionary determination when the circuit court applies the correct legal standard to the facts of record and reaches a reasonable result. ***Id.*** Our task as a reviewing court is to search the record for reasons to sustain the circuit court's exercise of discretion.[1] ***Id.***

¶5 WISCONSIN STAT. § 767.451(1)(b)1.[2] provides that, after two years, a circuit court may substantially modify custody or physical placement if the modification is in the child's best interest and there has been a substantial change in circumstances since the entry of the last custody and placement order. The statute establishes a rebuttable presumption 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

[1] The appendix to Smith's brief includes several documents that are not a part of the record, with many documents postdating the order on appeal. The record may consist of only those documents that were before the circuit court at the time it made the decision on appeal. It is not the function of this court to take additional evidence. *See* ***State ex rel. Wolf v. Town of Lisbon***, 75 Wis. 2d 152, 155-56, 248 N.W.2d 450 (1977). Therefore, we will not consider documents outside the record. Likewise, we will not consider arguments Smith raises for the first time on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

whom the child resides for the greater period of time is in the best interest of the child." WIS. STAT. § 767.451(1)(b)2.

¶6 Whether there is a substantial change in circumstances is a mixed question of law and fact. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 32-33, 577 N.W.2d 32 (Ct. App. 1998). The circuit court's findings of fact regarding an alleged change of circumstance since the last custody and placement order will not be disturbed unless clearly erroneous. ***Id.*** at 33. However, whether a substantial change in circumstances has occurred is a question of law we review independently. ***Keller***, 256 Wis. 2d 401, ¶7. Because the circuit court's legal determination is mixed with its factual findings, we give weight to the circuit court's decision. ***Rosplock***, 217 Wis. 2d at 33.

¶7 At the motion hearing, Smith argued she was better able than Lantz to manage Dylan's treatment for Attention Deficit/Hyperactivity Disorder (ADHD), citing Lantz's failure to timely follow up with the pediatrician or otherwise seek behavioral counseling for Dylan. Smith argued that Lantz's inability to manage Dylan's ADHD was negatively impacting Dylan's grades. Smith also expressed concern regarding both children being on "final warning" for truancy and Lantz's failure to regularly take them to a dentist. Smith criticized Lantz's recent move to a rental house that had inadequate heating in Mackenzie's bedroom, profanity on the walls, and a landlord with drug and alcohol issues. Smith asserted a change in the children's primary placement would be in their best interest, as she and her fiancé would provide a loving and traditional home. Smith also emphasized that her work schedule would allow her to meet all of the children's needs including "medical, educational, extracurricular activities and social groups."

¶8 In turn, Lantz's testimony responded to Smith's multiple concerns regarding his care of the children. Lantz conceded that Dylan's pediatrician appointments were missed due to doctor cancellations and miscommunication regarding the clinic location. Lantz indicated that Dylan had recently restarted taking his ADHD medications and sought to make up some failed classes in summer school. Lantz admitted there were problems getting the children to school, as he leaves for work at 5:30 a.m. Although Lantz used to wake the children and take them to a neighbor where they would await the bus, he had started allowing them to remain at home and get ready for the bus in his absence. Lantz, however, explained that several of the cited absences from school were because the children were sick.

¶9 With respect to dental care, Lantz conceded he should take them more often but has trouble affording the $500 deductible. As to his home, Lantz testified that although Mackenzie's bedroom does not have a heat vent, her room gets enough heat if her bedroom door is left open. Lantz further testified that his landlord had recently made improvements to the house, which included painting over any profanity on the walls. Although Lantz conceded his landlord "had some issues with the law," Lantz indicated the landlord is not a social friend and is only at the house if something must be fixed.

¶10 In his recommendation to the circuit court, the GAL recounted that Dylan expressed a strong desire to remain primarily placed with Lantz. Mackenzie stated she would prefer to live with Smith, though she loved her parents equally. The GAL opined that Smith's life had yet to stabilize, noting the number of times she had moved since the divorce. Although Smith indicated she was no longer drinking alcohol, the GAL questioned whether Smith's history of

alcohol abuse was "really behind her." Ultimately, the GAL recommended that primary physical placement remain with Lantz.

¶11 The circuit court denied Smith's motions to modify physical placement and child support, concluding Smith had not rebutted the presumption that the children's present placement with Lantz was in their best interest. Although the circuit court commended Smith's recent stability and determined it was a substantial change, the court concluded it was not enough to rebut the presumption and, therefore, did not justify a change in placement. Noting that it is "hard raising children, especially one who has some focus issues due to ADHD," the court concluded Lantz is "doing what he can." Consistent with the GAL's recommendation, the court determined it was in the children's best interest to remain primarily with Lantz. Because the court applied the correct legal standard to the facts of record and reached a reasonable result, we affirm the order.

¶12 Smith nevertheless contends the circuit court erred by excluding Smith's "supporting papers" at the motion hearing, thus preventing her from satisfying her burden of proof. The circuit court's determination to admit or exclude evidence is a discretionary decision that will not be upset on appeal absent an erroneous exercise of discretion. ***Kettner v. Kettner***, 2002 WI App 173, ¶14, 256 Wis. 2d 329, 649 N.W.2d 317. We discern no erroneous exercise of discretion in this case. At the hearing, Smith sought to submit "letters of recommendation," and the circuit court denied the request, noting that if Smith wanted somebody to testify on her behalf, they had to appear in court. Ultimately, the circuit court's refusal to admit hearsay evidence did not deny Smith the opportunity to present her case.

By the Court.—Order affirmed.

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