COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1769 **Cir. Ct. Nos. 2013FA6074**
2013FA6075

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

IN RE THE PATERNITY OF B. F. S. AND J. S. S.:
JACKSON SIMON,

PETITIONER-RESPONDENT,

V.

OLIVIA WILSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Curley, P.J., Kessler and Brash, JJ.

¶1 CURLEY, P.J. Olivia Wilson appeals the custody and placement order emanating out of two consolidated paternity acknowledgement actions. She

argues that the trial court erroneously exercised its discretion when it entered a joint legal custody order because the trial court failed to apply the rebuttable presumption found in WIS. STAT. § 767.41(2)(d)1. (2013-14)[1]:

> [I]f the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, … or domestic abuse, … there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party. The presumption under this subdivision may be rebutted only by a preponderance of evidence of all of the following:
>
> a. The party who committed the battery or abuse has successfully completed treatment for batterers provided through a certified treatment program or by a certified treatment provider and is not abusing alcohol or any other drug.
>
> b. It is in the best interest of the child for the party who committed the battery or abuse to be awarded joint or sole legal custody based on a consideration of the factors under sub. (5)(am).

Simon was convicted of disorderly conduct-domestic violence in August 2013. Given the statute's presumption, Wilson submits that the trial court failed to make a finding, as the statute requires, that Simon had successfully completed treatment for batterers. Next, she argues that the trial court erroneously exercised its discretion when it granted primary placement to Simon because by doing so, the trial court reversed a long-standing physical placement arrangement which would not have been necessary had the trial court properly followed § 767.41(2)(d)1. rebuttable presumption directive. This is so, according to Wilson, because Simon would not have been able to overcome the presumption. Finally, she contends that

[1] 2015 Wis. Act 172, § 211 amended WIS. STAT. § 767.41(3)(1). That amendment has no bearing on this case. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the trial court erroneously exercised its discretion when it prohibited her from consuming alcohol during her placement and also prohibited her from possessing firearms or weapons.

¶2 We are satisfied that the trial court properly exercised its discretion when it entered an order granting joint custody and primary placement to Simon because the trial court never found that there was "a pattern or serious incident of interspousal battery" which would have triggered the rebuttable presumption. We also conclude the trial court properly exercised its discretion in prohibiting Wilson from consuming alcohol while she has placement of the children. However, we agree with Wilson that nothing in the record supports the trial court's order prohibiting her from possessing firearms or weapons. Consequently, we affirm the trial court's order concerning joint custody and placement and the order prohibiting consuming alcohol during placement, but we reverse the prohibition that she cannot possess firearms or weapons.

BACKGROUND

¶3 Jackson Simon brought two separate paternity acknowledgment actions that were later consolidated concerning his children, J.S.S., with a date of birth of January 14, 2011, and B.F.S., with a date of birth of March 5, 2012. In his suit, he sought a determination of child custody and placement, child support, and other issues not relevant to this appeal. The legal actions were commenced following the separation of Wilson and Simon in August 2013 when Simon was charged with disorderly conduct-domestic violence. Simon pled guilty and was placed on probation for fifteen months.

¶4 The matter was heard by an Assistant Family Court Commissioner on January 14, 2014. At this hearing, the court was told that the children's

mother, Olivia Wilson, had left the state with the two children for a five-day trip contrary to the provisos contained in the summons, which had been served upon her. Wilson was warned that the children must remain in Wisconsin while the matter was pending. A temporary order was entered awarding joint custody, setting child support, and granting Wilson primary placement, with Simon having placement every other weekend from Friday evening through Monday morning. At a later review, Wilson was ordered to look for a job and to keep a diary of places where she applied. Prior to their separation, Wilson had been a stay at home mother.

¶5 On May 13, 2014, Simon filed an order to show cause for contempt. In his affidavit, he alleged that Wilson had not found full-time employment or kept a diary of places showing that she had applied for ten jobs per week. A hearing was held on June 16, 2014, and the trial court reserved ruling on the contempt motion and set the matter over to August 2014 and then again to February 2015. At the June 16 hearing, the trial court was advised that Wilson had moved out of the family home and moved to Burlington, Wisconsin. The trial court had ordered Wilson to continue living in the family home until she secured suitable other housing. The trial court scheduled the matter for trial on February 13, 2015.

¶6 On February 13, 2015, the trial court took testimony from various witnesses including Simon's cousin, a woman who runs a preschool located in Middleton, Wisconsin, where Simon had relocated. According to her testimony, the school was nationally accredited and both J.S.S. and B.F.S. were enrolled there. Simon, in furtherance of his request for joint custody and 50/50 shared placement of the children, testified that he was living in Middleton with his parents. He advised the court that the children had their own bedrooms in his parents' home. Simon told the court that he had completed his probation without

any violations and that during his probation he had completed a court-mandated course called "Dad[']s Matter." Simon explained to the court why he felt Middleton was a better environment for the children than Platteville where Wilson was currently living.

¶7 Wilson also testified. Wilson explained that she does not have a high school diploma and that she had previously been enrolled in classes to obtain an associate degree in equestrian science but never completed her degree. Wilson made it very clear that she believed her children's best interest would be served by staying at home with her until the oldest entered five-year-old kindergarten. She evidenced a desire to home school her children, but recognized that that did not seem to be possible at the present time. As to employment, she told the court that she had two part-time jobs and was living in a rented house in Platteville, Wisconsin. With regard to available schooling in Platteville, Wilson had not done much research into local schools and preschools, as it was her intention to keep the children at home until the oldest went to five-year-old kindergarten.

¶8 Wilson contends there had been incidents of domestic abuse before the incident in which Simon pled guilty to disorderly conduct. These incidents included a time in August 2012 when Simon wished to take his daughter out for a car ride and Wilson objected and placed her leg in the car door preventing it from closing. As a result, her leg was bruised. Another incident occurred when Simon fell asleep in a chair following an argument. Wilson came up behind him and hugged and kissed him. He told her to "[g]et the fuck away from me" and pushed her aside. Finally, she related that she and Simon were out for a walk when, during an argument, she suddenly decided to step in front of him to look him in the eyes and he pushed her aside. Wilson admitted that during the course of their relationship, she had struck Simon, spit at him, and yelled at him. She also

advised she is on the medication Prednisone, which has a side effect of mood disorders. Several other witnesses were also called.

¶9 Following the close of testimony, the GAL advised the court that he had two recommendations. First, if Wilson was willing to move within twenty or twenty-five miles of Middleton, the GAL believed a 50/50 placement would be in the children's best interests. If she was disinclined to move closer to Simon, then he recommended that primary placement be given to Simon with expansive secondary placement with Wilson, especially in the summer.

¶10 In its decision in awarding joint custody with primary placement with Simon, the trial court made the following pertinent findings: that Simon had successfully completed his probation and he had completed a parenting program. The trial court found there had been no subsequent incidents of domestic violence or abuse. The trial court characterized the prior incidents testified to by Wilson as inappropriate conduct but due in part to the immaturity of both parties and that such conduct was wrong and should not be repeated. In conclusion, the trial court found there is more stability in Simon's home. Consequently, the trial court found it is in the children's best interests to award joint legal custody to the parties and that effective July 1, 2015, primary placement would rest with Simon when the oldest child entered four-year-old kindergarten.

¶11 This appeal follows.

ANALYSIS

¶12 The standard of review applied to custody determinations is whether the trial court [erroneously exercised] its discretion or acted on an erroneous view of the law. ***Biel v. Biel***, 114 Wis. 2d 191, 195, 336 N.W.2d 404 (Ct. App. 1983).

To sustain a discretionary determination, the decision must be made and based on facts appearing in the record and in reliance on the appropriate and applicable law. ***Thorpe v. Thorpe***, 108 Wis. 2d 189, 195, 321 N.W.2d 237 (1982).

¶13 We will sustain a discretionary decision if the court "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." ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). We will affirm the trial court's findings of fact unless they are clearly erroneous, *see* WIS. STAT. § 805.17(2), but we independently review any questions of law. *See* ***Clark v. Mudge***, 229 Wis. 2d 44, 50, 599 N.W.2d 67 (Ct. App. 1999). "Our task as the reviewing court is to search the record for reasons to sustain the trial court's exercise of discretion." ***Hughes v. Hughes***, 223 Wis. 2d 111, 120, 588 N.W.2d 346 (Ct. App. 1998).

1. The trial court properly exercised its discretion in awarding the parties joint custody.

¶14 Wilson argues that the trial court made a finding that Simon engaged in domestic abuse and, as a consequence, the trial court was required to find that Simon had successfully completed a certified batterer's treatment program before the trial court could award joint custody to Simon. WISCONSIN STAT. § 767.41(2)(d)1. controls the trial court's custody awards when there is an allegation that "a party has engaged in a pattern or serious incident of interspousal battery … or domestic abuse." If the appropriate findings are made, then "there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party." ***Id.*** The presumption under this subdivision may be rebutted only, as relevant under facts here, by a preponderance of evidence of the following: "[t]he party who

committed the battery or abuse has successfully completed treatment for batterers provided through a certified treatment program or by a certified treatment provider and is not abusing alcohol or any other drug" and "[i]t is in the best interest of the child for the party who committed the battery or abuse to be awarded joint or sole legal custody based on a consideration of the factors under sub. (5)(am)." *See* §§ 767.41(2)(d)1.a. and b.

¶15 Simon responds that Wilson misreads that statute. In order to invoke the presumption, the statute requires that "a party has engaged in a pattern or serious incident of interspousal battery." Here, the trial court acknowledged the conviction of disorderly conduct-domestic violence, but did not consider the other instances related by Wilson as a "pattern" (as the parties were not married, there could not be any interspousal battery). Rather, the trial court characterized their collective conduct as arguments resulting from their immaturity. As the trial court stated in its oral decision:

> The court finds, therefore, based upon the record, that it is in the children's best interests that there shall be joint custody. I don't believe, nor do I find, that there is enough evidence in the record that would tip this one way or the other to direct sole custody to either of the parties, and that includes my consideration of the previous domestic violence incident.

This finding is consistent with the findings of the family court commissioner, who found that Wilson was not entitled to sole custody based on the statutes because it was "[one] incident and not a serious incident." Although the trial court could have more explicitly stated "[T]here is no pattern or serious incident of interspousal battery," the trial court's finding is tantamount to such a finding.

¶16 Moreover, had the trial court found a "pattern or serious incident of interspousal battery," the trial court could have determined that Simon rebutted the

presumption when it remarked that it was aware of Simon's successful completion of a criminal court mandated program called "Dad[']s Matter." Presumably, this program would have fulfilled the requirements of WIS. STAT. § 767.41(2)(d)1.a.

2. The trial court properly exercised its discretion when it granted primary placement to Simon.

¶17 Next, Wilson argues that "the [trial] court erroneously exercised its discretion in reversing the longstanding placement arrangement and granting primary placement to Simon." (Capitalization and emphasis altered.) In furtherance of this contention, Wilson argues that "[t]he court's placement order flowed directly from its failure to address the history of domestic abuse in granting joint legal custody." The problem with this argument is that the trial court properly determined that the rebuttable presumption found in WIS. STAT. § 767.41(2)(d)1. did not apply to the circumstances present here.

¶18 Further, in determining that the children's best interest was served by awarding Simon primary placement, the trial court discussed the factors found in WIS. STAT. § 767.41(5). The trial court pointed out the advantages the children would have in living with their grandparents and extended family in the Middleton area. The trial court was impressed with the quality of the school that the children attend. Contrast this to Wilson's home in Platteville, where the closest relative was over an hour's drive away and there was little knowledge about the available schools or preschools in Platteville. Also, Wilson had a spotty employment history and a tendency to move around. When the action started, she was living in the family home in Milwaukee, then moved to Burlington, and then back to the family home, and finally, she settled in Platteville. Finally, the trial court also attempted to accommodate Wilson by giving her additional placement in the summer.

3. It was a reasonable exercise of the trial court's authority to prohibit Wilson from consuming alcohol during her periods of placement, but the trial court went one step too far in prohibiting her from possessing firearms or weapons.

¶19 Wilson argues that the trial court had no authority to prohibit her from consuming alcoholic beverages during her periods of placement nor any authority to prohibit her from possessing firearms or weapons at any time.[2] Simon argues that these conditions are a proper exercise of the trial court's discretion. Neither party has pointed to any statute or case law for their position, other than Wilson arguing she has a fundamental right to bear arms as set forth in WIS. CONST. art. I, § 25.

¶20 Although the trial court has broad discretion with respect to custody determinations, which will be given great weight on review, ***Allen v. Allen***, 78 Wis. 2d 263, 271, 254 N.W.2d 244 (1977), "[c]ourts have no power in awarding custody of minor children other than that provided by statute." ***Groh v. Groh***, 110 Wis. 2d 117, 123, 327 N.W.2d 655 (1983) (two sets of quotation marks and citation omitted). An erroneous exercise of discretion occurs when the court applies an erroneous rule of law. ***Gould v. Gould***, 116 Wis. 2d 493, 498, 342 N.W.2d 426 (1984). "[W]here the legislature has set forth a plan or scheme as to the manner and limitation of the court's exercise of its jurisdiction, that expression of the legislative will must be carried out and power limitations adhered to." ***Groh***, 110 Wis. 2d at 123.

[2] Simon claims that the trial court's order actually should be read to prohibit Wilson from possessing firearms or weapons only during her periods of placement. The order reads: "The court orders no alcohol is to be utilized by either party during their respective placement times and neither parent is to possess firearms or weapons." Simon's interpretation is a tortured reading of the order. The order clearly conditions the prohibition of imbibing of alcohol to placement times. There is no such time limitation on the possession of firearms or weapons.

¶21 WISCONSIN STAT. § 767.41(5) lists the factors to be considered in custody and physical placement determinations. One of the factors that a trial court is to consider is whether either party has or had a significant problem with drug or alcohol abuse. Sec. 767.41(5)14. Although the record reflects that alcohol abuse was once a problem for Simon, there is no documentation of abuse of alcohol by Wilson. However, the record does reflect that her chronic illness calls for her use of a medication that can cause mood disorders. The fact that alcohol can alter moods is well known. As a result, it appears imminently reasonable for the trial court to prohibit the consummation of alcohol during Wilson's periods of placement.

¶22 However, there is no evidence in the record that supports a condition that neither party possess firearms or weapons. The trial court recognized that the condition prohibiting firearms or weapons might be on thin ice when the trial court said when discussing the prohibition on firearms or weapons: "This … is something that the court knows may be stretching it, but I think it's for their benefit." While the trial court's order was, no doubt, well-meaning, it has no support in the record. Consequently, the order prohibiting Wilson from possessing firearms or weapons is reversed.[3]

¶23 Based on the foregoing, the order granting joint custody with primary placement with Simon is affirmed, as is the order prohibiting Wilson from consuming alcoholic beverages during her periods of placement. However, the

[3] As to the issue which remained unresolved concerning whether Wilson was in contempt for failing to provide a diary of job applications, the trial court also found that Wilson was not in contempt for failing to find full-time employment because she did not willfully violate the order.

order prohibiting Wilson from possessing firearms or weapons is reversed. Accordingly, the trial court is instructed to issue an order expunging the weapon prohibition as to Wilson.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.