COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3040

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

IN RE THE MARRIAGE OF:

ROSEMARY G. O'BRIEN,

PETITIONER-APPELLANT,

V.

CRAIG P. O'BRIEN,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Polk County: EUGENE HARRINGTON, Judge. *Affirmed.*

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

PER CURIAM. Rosemary O'Brien appeals a divorce judgment awarding primary placement of the children to her former husband, Craig O'Brien. She argues that the trial court erred in the following ways: (1) it awarded primary placement to Craig and only alternate weekends and one week night every other

week to Rosemary; (2) it authorized Craig to make all religious decisions; (3) it found that Rosemary willfully engaged in conduct forbidden by the temporary order; (4) it accepted the guardian ad litem's unsupported factual assertions; and (5) it denied Rosemary's motion for rehearing based on issues including newly discovered evidence and ineffective assistance of counsel for the children. Rosemary further argues that her constitutional rights, and those of the children, to effective assistance of counsel, were violated. We reject her arguments and affirm the judgment.

Rosemary and Craig were married in 1987 and have four minor children. When this action for divorce was filed in 1997, the court appointed a guardian ad litem to represent the children's best interests. At the two-day custody trial, the guardian ad litem cross-examined nine witnesses and made a recommendation based upon the factors in § 767.26, STATS. Her recommendation was that during the school years, Craig have primary physical placement and Rosemary have alternate weekends, in addition to holiday and summer placement. The trial court accepted the guardian ad litem's recommendation with some modifications in the placement schedule. After the court denied Rosemary's motions for a rehearing, she filed this appeal.

At the outset, we note that appellate counsel's unfortunate disregard of many of the rules of appellate briefing, RULE 809.19(1), STATS., suggests a failure to appreciate their purpose, which is to facilitate a court's meaningful review. *See* ***Cascade Mtn., Inc. v. Capitol Indemn. Corp.***, 212 Wis.2d 265, 269-70, 569 N.W.2d 45, 47 (Ct. App. 1997). The rules require that the factual

statement be separate from the argument,[1] and that legal argument be accompanied by citation to the appropriate authority.[2] RULE 809.19(1), STATS. The argument on each issue should be stated separately.[3] ***Id***. Factual references are to be accompanied by appropriate record citation.[4] ***Id***. Implicit in the rules is the requirement that the brief be written and organized in idiomatic language.[5]

The rules of appellate briefing permit the court to precisely identify an appellant's claim of error and the law upon which she relies. Argument does not belong in the fact section of the appellate brief. "A lawyer must distinguish a fact from an inference he seeks to press on the court. It is unprofessional conduct to represent inferences as facts. … Misleading representations, whether deliberate or careless, misdirect the attention of other lawyers and the district judge." ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 819 (7th Cir. 1987).

Also, combining several issues in one argument poses a difficult task for the court and opposing counsel to sort out and analyze arguments to corresponding respective issues. Appellant's failure to comply with these rules not

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[1] For example, in her statement of facts, Rosemary's counsel states that the court's conduct was "disturbing"; that the guardian ad litem's decisions were "disconcerting"; and that the Court was "rubber stamping" the guardian ad litem's decision.

[2] The appellant's section entitled "Legal Argument on Issues I and V" does not contain one citation to legal authority.

[3] In appellant's section entitled "Legal argument on issues IV, V, VI and VII," Rosemary combines several issues.

[4] Rosemary's counsel's lengthy appendix contains a table of contents, but neither the table of contents nor the documents themselves identifies the document number in order to locate the items in the record. The photocopy of the clerk's index attached to her reply brief does not cure the deficiency.

[5] Rosemary's brief contains sentences in excess of 100 and 150 words, and a single paragraph that is over four pages long.

only inhibits the court's ability to track and review her issues, it also is subject to sanction, *see* RULE 809.83(2), STATS., including striking the brief and summary dismissal.[6] While we do not impose sanctions at this juncture, we admonish counsel that future noncompliance will not be accepted.

We begin with some general observations regarding the role of an appellate court. We do not find facts; the weight and credibility of testimony is for the fact-finder, here, the trial court. Section 805.17(2), STATS. Custody and placement issues are addressed to trial court discretion. *See* ***Licary v. Licary***, 168 Wis.2d 686, 692, 484 N.W.2d 371, 374 (Ct. App. 1992). Judicial discretion is the reasoned application of the proper principles of law to the facts that are properly found. *See* ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). We may search the record for reasons to support a discretionary decision. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968). It is well established that a trial court, in the exercise of its discretion, may reasonably reach a conclusion that another court would not. ***Liddle v. Liddle***, 140 Wis.2d 132, 156, 410 N.W.2d 196, 206 (Ct. App. 1987).

With these principles in mind, we turn to Rosemary's contentions of error.[7] Rosemary argues that the trial court erroneously ordered that Craig is entitled to make religious decisions for the children and need not consult with Rosemary. She contends that this order is inconsistent with the concept of joint legal custody and that there is no evidence that she is "unfit or incompetent to

[6] While the rules do not address the tone of the brief, we make the too often quoted observation that Rosemary's brief sheds more heat than light.

[7] Because her first legal issue regarding custody is not accompanied by legal authority, we do not address it on appeal. It is not this court's function to supply legal research and develop argument. *See* ***State v. Waste Management***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

make religious decisions." She essentially argues that religion is a private realm of family life, which the state cannot enter.

We are unpersuaded. When Rosemary filed her petition for divorce, she submitted to the court's "jurisdiction of all actions affecting the family and [the court's] authority to do all acts and things necessary and proper." Section 767.01, STATS. As Rosemary acknowledges in her brief, the legal custodian has the responsibility to make major decisions, including the choice of religion. *See* § 767.001(2), STATS. When the court orders joint legal custody, the parties share this responsibility, "except with respect to specified decisions as set forth by the court." Section 767.001(1s), STATS.

There is no requirement that the court make a finding of unfitness in order to allocate parental responsibilities between joint legal custodians. The trial court has a role to promote the stability and best interests of the family. *See* ***Kritzik v. Kritzik***, 21 Wis.2d 442, 448, 124 N.W.2d 581, 585 (1963). Here, it was reasonable for the trial court to conclude that discord between the parties with respect to religious decisions would not be in the children's best interests. Therefore, to promote stability, it allocated the decision making role to Craig as the primary physical custodial parent. The record reflects a reasonable exercise of discretion consistent with the court's authority under § 767.001(1s), STATS.

Next, Rosemary argues that the trial court erroneously determined that by cohabitating with Gary Nordin, she violated the temporary order "to such a degree that primary placement of the children should be taken from her." She argues that no evidence of this conduct was elicited at trial.

This argument is not accompanied by record citation. *See* § 809.19(1), STATS., *see also* ***Tam v. Luk***, 154 Wis.2d 282, 291 n.5, 453 N.W.2d

158, 162 n.5 (Ct. App. 1990). Our review of the record reveals that the argument mischaracterizes the court's determination. With respect to the issue of credibility, the trial court stated:

> The order specifically says there was not to be any friends at the house and the camper parked in the street is a cute subterfuge to circumvent a court order. …
>
> … I know none that have been Judges that would tolerate this subterfuge.
>
> The court finds that Mrs. O'Brien's credibility is lacking with respect to her statement that she will cooperate with Mr. O'Brien.

Because the record fails to support Rosemary's claim that the court denied her primary placement based upon cohabitation, we reject the argument.

Finally, Rosemary combines into one argument various contentions. She contends that the guardian ad litem failed to adequately support her recommendations with facts and failed to provide effective representation for the children. Rosemary also argues that she received ineffective assistance of counsel, that these deficiencies, and those of the guardian ad litem, violated "Statutory, case law, U.S. Constitutional and 14th Amendment rights" and that the trial court failed to reopen the judgment for rehearing under the "catch-all" clause in § 806.07, STATS., for "any other reasons justifying relief."

To address these contentions, we reviewed the post-trial motion entitled "Notice of Motion and Motion for Rehearing" along with the affidavit and attached exhibits. We also reviewed the court's order arising out of the October 7, 1998, hearing on the motion. We note that the supplemental index states that no transcript of the hearing was ever filed.

Based on the limited record before us, Rosemary's remaining claims of error are unreviewable. Without the transcript of the hearing, this court must assume that the record supports the court's denial of the motion to reopen the judgment under § 806.07, STATS. "[W]hen an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling." ***Fiumefreddo v. McLean***, 174 Wis.2d 10, 27, 496 N.W.2d 226, 232 (Ct. App. 1993). Additionally, the record fails to disclose that Rosemary's constitutional and ineffective assistance of counsel issues were raised before the trial court. Therefore we do not address these arguments for the first time on appeal. *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992).

By the Court.—Judgment affirmed.

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