COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0994

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

IN RE THE MARRIAGE OF:

RAYMOND ALLEN,

PETITIONER-RESPONDENT,

V.

ELIZABETH SNIDER ALLEN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 VERGERONT, J. Elizabeth Snider Allen appeals the trial court's order regarding physical placement and support for her daughter, Aleta, which

modified provisions in the judgment of divorce between Elizabeth and Ray Allen, Aleta's father. Elizabeth contends the trial court erred and erroneously exercised its discretion in these ways: (1) giving Ray primary physical placement of Aleta, with final decision-making authority for all major decisions relating to Aleta, and placement with Elizabeth only as agreed to between the parents and Aleta; (2) making certain procedural rulings; (3) ordering that she pay "retroactive" child support; (4) ordering that she deposit $1,000 for guardian ad litem fees before she could contest Ray's motion for modification; (5) ordering that she contribute $2,500 to Ray's attorney fees; and (6) ordering that she pay all guardian ad litem fees after November 9, 1998.

¶2 We conclude the trial court properly exercised its discretion in modifying physical placement and decision-making authority, in making the challenged procedural rulings, and in ordering that her support obligation begin on the date of Ray's motion. We conclude that the issue concerning the deposit of $1,000 for guardian ad litem fees is moot and we do not address it. For the reasons we explain in the opinion, we reverse the court's order on Elizabeth's contribution to Ray's attorney fees and her obligation for the guardian ad litem fees and remand for further proceedings.

BACKGROUND

¶3 The divorce judgment, entered on December 13, 1991, awarded joint legal custody of the parties' two daughters, Wynter, who is no longer a minor, and Aleta, d/o/b October 23, 1983, with physical placement alternating on a weekly basis. There were subsequently a number of disputes relating to physical placement, and the trial court referred the parents to the Dane County Family Court Counseling Service in 1992, 1993, and 1996. December 13, 1996, was the

date of the last order entered on physical placement before the proceedings relevant to this appeal began. That order provided that Aleta was to resume the physical placement schedule established in the Judgment of Divorce and that Elizabeth was to have final decision-making authority on Aleta's mental health needs.

¶4 In June 1998, Ray moved the court to modify the divorce judgment and grant him primary physical placement of Aleta with final decision-making authority for all major decisions, terminate his child support obligation, establish a child support obligation for Elizabeth, and establish equal responsibility for Aleta's uninsured health care expenses. In an accompanying affidavit, he averred that Aleta had not been alternating placement with each parent on a weekly basis, but preferred to reside primarily with him and had stayed at her mother's house only a few days since February 1, 1998.

¶5 After a status conference on the motion, a temporary order was entered on August 10, 1998, whereby Aleta would continue to reside primarily with her father, and Ray's support obligation would be temporarily suspended. At this time, Elizabeth was not represented by counsel. The order also provided the parties were to be equally responsible for the guardian ad litem fees, subject to future reconsideration by the court, and were each to pay $200 per month to the guardian ad litem or one-half the balance due, whichever was less. At a subsequent status conference, held on December 11, 1998, the court scheduled a hearing on February 9, 1999, for Ray's motion. At this time, Elizabeth was represented by counsel. The court also ordered Elizabeth to make a $1,000 deposit to the guardian ad litem by December 20, 1998, "or be in default." This order was in response to the guardian ad litem's motion asserting that Elizabeth

had paid only $100 toward her balance due as of November 2, 1998, with the result that there was a balance due of approximately $285.

¶6 On January 11, 1999, the court granted Elizabeth additional time to pay the $1,000, to January 18, 1999, at 4:30 p.m., and ordered that if the payment were not made by that time, Elizabeth would lose her right to contest Ray's motion to modify placement. Elizabeth's attorney filed an objection to the court's order that she deposit the $1,000 or lose the right to contest Ray's motion regarding placement, contending that the court did not have authority to impose that sanction on a party "for failure to meet a monetary obligation, let alone a potential monetary obligation." However, Elizabeth made the deposit and it appears there was no further ruling on the subject.

¶7 On January 22, 1999, Elizabeth, through counsel, filed motions for: an order restoring equal placement and modifying child support; a custody study, psychological evaluations of Aleta and Ray and postponement of the February 9 hearing; and an order finding Ray in contempt for violation of the order on physical placement that was in effect prior to the stipulated temporary order of August 10, 1998. Before these motions were addressed by the court, the court granted Elizabeth's counsel's motion to withdraw.[1] Elizabeth appeared pro se at the hearing on her motions on February 2, 1999. The court denied the request for a postponement of the February 9 proceeding, denied the request for psychologicals as untimely and without an adequate showing of their usefulness, and denied the request for a custody study based on the family court counselor's

[1] This was Elizabeth's counsel's second motion to withdraw. The court had denied the first motion on January 11, 1999.

statements that no further evaluation was needed beyond a brief conversation with Aleta, which the court approved.

¶8 Elizabeth appeared pro se at the hearing on February 9, 1999. The court heard the testimony of Elizabeth, Ray, and the family court counselor, who recommended that primary placement be with Ray and contact between Elizabeth and Aleta be as Aleta and her parents agree, without any established schedule. The counselor testified this was consistent with Aleta's wishes. The guardian ad litem agreed with the counselor's recommendation and agreed with the counselor's assessment of Aleta's wishes.

¶9 The trial court's written order made the following findings. Aleta had primarily been residing with her father since the end of January 1998 and expressed a preference for maintaining that arrangement. Elizabeth "has a problem with reality testing" and is unwilling and unable to acknowledge that Aleta is caught in the middle of the placement disputes. Aleta's decision about where to live is her choice and is not the result of Ray preventing contact with Elizabeth, and "[t]here have been unnecessary legal proceedings to communicate this reality to [Elizabeth]." The problems in Elizabeth's relationship with her daughter exceed normal mother-daughter disputes. The parties are unable to share joint placement and decision-making. It is in the best interests of Aleta to grant primary physical placement, with Ray having final decision-making authority for all major decisions and Elizabeth having physical placement, including placement on holidays, as mutually agreed between the parents and their daughter.

¶10 The court denied Elizabeth's motion for equal placement and for contempt. It ordered her to pay child support in the amount of $570 per month retroactive to June 16, 1998, payable biweekly, with $50 to be paid per month on

the arrears, and it ordered that the parties be equally responsible for uninsured healthcare expenses. Finally, it ordered that Elizabeth contribute $2,500 to Ray's attorney fees, payable at $75 per month, and that she be responsible for all guardian ad litem fees incurred on and after November 9, 1998, through the date of the hearing on February 9, 1999, payable at $50 per month.

DISCUSSION

Physical Placement and Decision-Making Authority

¶11 We first consider Elizabeth's challenge to the court's decision on physical placement and decision-making authority. The trial court may modify orders of physical placement when it is the best interests of the child to do so and there has been a substantial change in circumstance since the last order substantially affecting physical placement. WIS. STAT. § 767.325(1)(b)1 (1997-98).[2] Decisions on physical placement are committed to the trial court's discretion. ***Koeller v. Koeller***, 195 Wis. 2d 660, 663, 536 N.W.2d 216 (Ct. App. 1995). We affirm the trial court's decision if the court properly exercised its discretion—that is, applied the correct law to the facts of record, and, employing a logical rationale, reached a reasonable result. ***Jocius v. Jocius***, 218 Wis. 2d 103, 110-111, 580 N.W.2d 708 (Ct. App. 1998). The weight to be given testimony as well as the credibility of witnesses is for the trial court acting as the trier of fact to decide. ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 533, 485 N.W.2d 442 (Ct. App. 1992); ***Gardner v. Gardner***, 190 Wis. 2d 216, 230, 527 N.W.2d 701 (Ct. App. 1994). We do not set aside the trial court's findings of fact unless they are clearly

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

erroneous, and we give due regard to the opportunity of the trial court to judge the credibility of the witnesses. WIS. STAT. § 805.17(2).

¶12 We conclude the trial court's decision to grant primary physical placement to Ray and placement with Elizabeth only as agreed between the parents and child is a proper exercise of discretion. Although the court did not expressly state there had been a substantial change of circumstance since the last order, it implicitly so found, and the evidence supports such a finding. The court considered factors relevant to Aleta's best interests in reaching this decision: her preference, where she had been living for an extended period of time, the nature of her relationship with each parent, and each parent's ability to consider what is best for Aleta.[3] To the extent that Elizabeth's testimony was in conflict with Ray's testimony concerning the genuineness of Aleta's choice and other matters, it was for the trial court to resolve those conflicts. The trial court had the opportunity, as this court does not, to see and hear the parties and so to better weigh and evaluate their testimony. The testimony of the family court counselor provides additional support for the court's decision. Although the trial court was, of course, not obligated to follow the recommendation of the family court counselor, it was

[3] Under WIS. STAT. § 767.325(1)(b)2.a and b there is a rebuttable presumption that continuing the current allocation of decision making and continuing the child's physical placement with whom the child resides for the greater period of time is in the best interests of the child. Under § 767.325(2)(b) when a motion is brought to modify an order giving substantially equal placement to the parties, there is a rebuttable presumption that having substantially equal placements is in the best interests of the child. The court did not discuss these presumptions, and the parties do not on appeal. How and if the presumptions in § 767.325(1)(b)2.b and (2)(b) apply in this case—where Aleta had not been staying with both parents equally for some time, although the last order so provided—is not clear. However, we are satisfied that even if there were a rebuttable presumption arising from the December 13, 1996 order that continuation of equal placement was in Aleta's best interests, the court could reasonably decide that the evidence was sufficient to overcome that presumption.

proper for the court to consider her testimony and recommendation, and it was up to the court to determine how much weight to give those.

¶13 We reach the same conclusion with respect to the trial court's decision on authority for major decisions. The court had before it ample evidence of the inability of Ray and Elizabeth to make joint decisions concerning Aleta, and the same evidence that supports the court's decision on placement supports its decision to give Ray final decision-making authority for all major decisions.

Procedural Rulings

¶14 Elizabeth next raises three challenges to the proceedings leading up to the court's decision modifying physical placement. First, she contends the court erred in modifying physical placement because it did not first order mediation with family court counseling services. We disagree. WISCONSIN STAT. § 767.11(5), (6) and (8) provide:

> (5) MEDIATION REFERRALS. (a) In any action affecting the family, including a revision of judgment or order under s. 767.32 or 767.325, in which it appears that legal custody or physical placement is contested, the court or family court commissioner shall refer the parties to the director of family court counseling services for possible mediation of those contested issues….
>
> ….
>
> (6) ACTION UPON REFERRAL. Whenever a court or family court commissioner refers a party to the director of family court counseling services for possible mediation, the director shall assign a mediator to the case. The mediator shall provide mediation if he or she determines it is appropriate. If the mediator determines mediation is not appropriate, he or she shall so notify the court….
>
> ….
>
> (8) INITIAL SESSION OF MEDIATION REQUIRED. (a) Except as provided in par. (b), in any action affecting the family, including an action for revision of judgment or

> order under s. 767.32 or 767.325, in which it appears that legal custody or physical placement is contested, the parties shall attend at least one session with a mediator assigned under sub. (6) or contracted with under sub. (7) and, if the parties and the mediator determine that continued mediation is appropriate, no court may hold a trial of or a final hearing on legal custody or physical placement until after mediation is completed or terminated.
>
> (b) A court may, in its discretion, hold a trial or hearing without requiring attendance at the session under par. (a) if the court finds that attending the session will cause undue hardship or would endanger the health or safety of one of the parties….
>
> ….
>
> (c) The initial session under par. (a) shall be a screening and evaluation mediation session to determine whether mediation is appropriate and whether both parties wish to continue in mediation.

¶15 There were numerous referrals to family court counseling services in an effort to resolve the parties' continuing conflicts. The family court counselor who worked with the parties advised the court at the hearing on February 2, 1999, with both parties present, that she believed further involvement by her agency, beyond briefly talking to Aleta, would not aid in resolving the parties' dispute. The counselor testified that mediation with family court counseling services and in less formal ways with other professionals several times over the past nine years had been of limited use, and she "strongly urge[d]" the court to waive mediation should a dispute arise in the future because "it would simply be a waste of everyone's time." The purpose of the statute—to attempt to resolve parents' conflicts over their children through mediation when that is possible—was fully satisfied.

¶16 Second, Elizabeth contends the court erred in not holding a hearing on her motion for contempt before it issued the August 10, 1998 temporary order. Again, we disagree.

¶17 Elizabeth is referring to the letter she wrote to the court, titled "cross-motion," filed on July 24, 1998, in response to Ray's motion for modification of placement. In that document she asked for sanctions against Ray for being in contempt of the placement order, as well as making a number of factual assertions and asking for her own changes in the placement order. The minute sheet for the status conference on July 30, 1998, shows that Elizabeth appeared unrepresented and the parties stipulated to a temporary order. However, Elizabeth later objected by letter to the order drafted by Ray's counsel, and, in that letter, referred to her "motion," asked what would happen to that if the proposed order were signed, and stated, "Since the court indicated my motion lacks clarity, I would like to know the timeline for re-filing it." The court signed the temporary order as drafted in spite of her objections. After Elizabeth obtained counsel, her attorney on January 22, 1999, filed a formal motion for contempt, based on the same substantive grounds as contained in the "cross-motion" letter.

¶18 Trial courts have inherent authority to control their dockets to achieve economy of time and effort, and the manner in which a court exercises this authority is committed to its discretion. ***Lentz v. Young***, 195 Wis. 2d 457, 465, 536 N.W.2d 451 (Ct. app. 1995).

¶19 It is evident that Elizabeth understood she needed to clarify her motion and refile it, and, when she obtained counsel, her attorney did that. The court was under no obligation to decide her claim of contempt before it entered a temporary order, even if that order were not agreed to by Elizabeth. The contempt claim required a resolution of many of the issues the court needed to resolve in order to decide Ray's motion for a modification, and it was reasonable for the court to enter a temporary order to settle the situation until the court was able to

hold a full evidentiary hearing at which it resolved both motions. WIS. STAT. § 767.23(1)(am).

¶20 Third, Elizabeth contends the court erroneously exercised its discretion in denying her request for a continuance of the February 9, 1999 hearing. She contends she requested a continuance at the hearing on January 29, 1999, at which her attorney was permitted to withdraw. The record does not so indicate, but Ray does not dispute that. The court's comments at the beginning of the February 2, 1999 hearing show Elizabeth requested a reconsideration of that denial, which the court denied. When Elizabeth stated at the beginning of the February 9 hearing that she did not feel able to represent herself, the court stated:

> Well, I have dealt with your several requests for continuance previously and indicated the importance of your meeting your obligations with your prior counsel and the need for finality here and the length of time this matter has been pending as justifications for denial of further delays in this case. I would have preferred that you have counsel as well, but I had inadequate assurances that a delay would accomplish a stable attorney/client relationship given the multitude of prior counsel that you had and had parted company with for whatever reasons.

¶21 The grant or denial of a continuance is within the trial court's discretion. ***In re Guardianship of Schmidt***, 71 Wis. 2d 317, 320, 237 N.W.2d 919 (1976). We conclude the court properly exercised its discretion. Ray's motion for a modification of physical placement had been pending since June 1998, the court had held numerous conferences and hearings since then, and the February 9, 1999 date had been scheduled since December 11, 1998. Elizabeth had been unrepresented for a portion of that time, and had three different attorneys of record during post-judgment proceedings. The court had heard considerable testimony

on counsel's first motion to withdraw,[4] which was relevant to the likelihood that Elizabeth would be able to retain new counsel and maintain a relationship with new counsel. Based on the record before the court, it could reasonably decide that a continuance would not likely result in Elizabeth having counsel at a continued hearing and that it was therefore not in Aleta's best interests to postpone resolution of the conflict for that reason.

Child Support

¶22 Elizabeth contends the court was without authority to order that she pay child support retroactive to June 16, 1998. She relies on ***Strawser v. Strawser***, 126 Wis. 2d 485, 489, 377 N.W.2d 196 (Ct. App. 1985), which held that the court did not have the authority when ordering maintenance in September 1984 to backdate the award of maintenance to November 1981. The facts of that case are not similar to this because in ***Strawser*** the court was not ruling on a motion that had been filed in November 1981. WISCONSIN STAT. § 767.32(1m) provides that the court "may not revise the amount of child support [or] maintenance … prior to the date that notice of the action is given to the respondent…." Therefore, the trial court in this case had the statutory authority to order that Elizabeth pay child support beginning on and after the date on which she was given notice of the June 15, 1998 motion to order that she pay child support.[5] The question, then, is

[4] *See* footnote 1.

[5] The court found that Elizabeth was served on June 16, 1998, and she does not argue otherwise.

whether the court properly exercised its discretion in ordering that Elizabeth's support obligation begin on June 16, 1998.[6] We conclude that it did.

¶23 The court's reason for imposing an obligation beginning June 16, 1998, was that Aleta had had "almost exclusive placement" with Ray since the date on which the motion was filed. The record supports this finding. The court's order that the resulting arrears be paid at $50 per month is a modest addition to the $570 current obligation and we cannot say it is unreasonable.

Deposit on Guardian ad Litem Fees

¶24 Elizabeth contends the trial court erred in ordering her to deposit $1,000 for the guardian ad litem fees or lose the right to contest Ray's motion for modification of placement. Since Elizabeth did pay that sum and did not lose the right to contest the motion, the issue is moot. Generally we do not decide moot issues unless there are compelling reasons to do so. ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 591, 445 N.W.2d 676 (Ct. App. 1989). We decline to review the issue.

Contribution to Attorney Fees and Obligation for Guardian ad Litem Fees

¶25 Elizabeth contends the trial court erred in ordering her to make a $2,500 contribution to Ray's attorney fees and to pay all the guardian ad litem fees from November 9, 1998, to the date of the evidentiary hearing. She contends the court did not take into account her or Ray's ability to pay, penalized her for not having an attorney even though it did not permit a continuance so she could get

[6] The monthly support ordered, $570, is 17% of Elizabeth's gross monthly income of $3,354 per month.

one, and penalized her for not settling and instead advancing what she believes to be a legitimate position.

¶26 At the February 9 hearing, Ray submitted evidence that his attorney fees, including preparation for and appearance at the hearing were $3,689.20. His attorney argued that the court should order Elizabeth to contribute to his attorney fees, which "are in direct relation and proportionate to the problems that the Court has experienced with how the respondent has conducted herself." He also argued that she should be responsible for all the guardian ad litem fees from November 9, 1998, forward, because on that date at a status conference it was clear that the court was encouraging settlement. He asserted that "the challenge to the recommendation of the guardian ad litem and now with the counselor was frivolous." He contended that the hearing was unnecessary, and many other hours of proceedings were unnecessary because Elizabeth ignored the court's encouragement of settlement and the discussions of options that were realistic.

¶27 In making its decision, the court stated:

> In terms of disproportionate allocation of guardian ad litem fees, as suggested by Mr. Beilke, I believe that should be the exclusive responsibility of Ms. Snider-Allen from November 9, 1998 forward. As was suggested, I advised Ms. Snider-Allen in light of the strength of the guardian ad litem's report that and the rather obvious reality of this situation that she would likely bear the responsibility of that if there were not some significant new facts brought to my attention. There were not. This was an unnecessary proceeding. There was subjective good faith on the part of Ms. Snider-Allen in terms of her own beliefs but objective bad faith in terms of the broader realities of this case, and there's no reason that Mr. Allen should be saddled with those additional fees. And in terms of a contribution towards his attorneys fees, I believe that is warranted. I will order a contribution of $2,500 from Ms. Snider-Allen to Mr. Allen because of inappropriate and poor judgment exercised by Ms. Snider-Allen in the manner in which this

> matter has been litigated. The faxes that were sent to this Court suggesting that the matter had been settled and then unsettled within days of each other is a small reflection of this bad judgment in the manner in which this matter has been litigated.

¶28 Ray contends on appeal that the court had authority to order Elizabeth to contribute to Ray's fees under WIS. STAT. § 767.262(1), because of overtrial, and under WIS. STAT. § 814.025.

¶29 WISCONSIN STAT. § 767.262(1)(a) permits a court "after considering the financial resources of both parties," to order either party to pay a reasonable amount of attorney fees for the costs to the other party, including attorney fees, of maintaining or responding to the action. An award under this section requires that the court make findings of fact as to the reasonableness of the total fees, the need of one spouse for contribution, and the ability of the other spouse to pay. ***Corliss v. Corliss***, 107 Wis. 2d 338, 350-51, 320 N.W.2d 219 (Ct. App. 1982). We see nothing in the record to indicate that the court decided to order Elizabeth to contribute to Ray's attorney fees based either on her ability to pay or his need for contribution. This is not suggested either in the argument of Ray's counsel to the court or the comments of the trial court. While we acknowledge that the court did have the parties' financial information before it because of the child support issue, we cannot infer from that alone that the court ordered attorney fees based on Elizabeth's ability to pay or Ray's need: Ray's gross income is substantially greater than Elizabeth's, and the court had just ordered her to begin making monthly child support payments, thereby reducing the amount of her gross income available for other purposes.

¶30 Another ground for an award of attorney fees in family matters is overtrial. "Overtrial" refers to costs of the litigation incurred by one party as a result

of the other party's "unreasonable ... approach to the case." ***In re Ondrasek***, 126 Wis. 2d 469, 484, 377 N.W.2d 190 (Ct. App. 1985). An unreasonable approach to the litigation is one that results in unnecessary proceedings or unnecessarily protracted proceedings, together with attendant preparation time, for which the opposing party is obliged to pay. ***Id.*** Thus, fees awarded for overtrial constitute compensation for out-of-pocket costs incurred by a party who has been put to unreasonable and unnecessary expense because of the "nature in which the [other party] pursued the litigation." ***Id.*** at 483.

¶31 Some of Ray's attorney's arguments to the trial court, and some of the court's comments suggest that overtrial may have been a basis for its decision. The trial court's award of only a portion of the attorney fees could be a determination that $2,500 is the amount attributable to Elizabeth's conduct in unnecessarily adding to the time and expense of litigation. However, the court provided no explanation as to how it arrived at this figure, and we are unable to tell from our own review of the record, including Ray's counsel's statement of fees, whether the record supports a determination that this amount resulted from Elizabeth's overtrial.

¶32 A third ground for an award of attorney fees is a determination that a litigant's claim or defense is frivolous under WIS. STAT. § 814.025(3)—either because the claim or defense was made "in bad faith, solely for the purposes of harassing or maliciously injuring another," (para. (a)), or because the litigant knew or should have known that the claim or defense "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law," (para. (b)). A frivolous claim or defense is not the same as overtrial: one may have a non-frivolous claim or

defense but nevertheless pursue it in a manner that results in unnecessary proceedings or unnecessarily protracted proceedings.

¶33 Whether a party acted in bad faith and solely for the purpose of harassing or maliciously injuring another is analyzed under the subjective standard. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 235-36, 517 N.W.2d 658 (1994). The court must determine what was in the person's mind and whether his or her actions were deliberate or impliedly intentional with regard to harassment or malicious injury. ***Id.*** at 236.

¶34 The court's finding that Elizabeth had "subjective good faith" appears to rule out WIS. STAT. § 814.025(3)(a) as a ground for an award of fees, and we do not understand Ray to argue otherwise.

¶35 In contrast to the analysis under WIS. STAT. § 814.025(3)(a), a finding of frivolousness under para. (3)(b) of § 814.025 is based on an objective standard: "whether the attorney [or party] knew or should have known that the position taken was frivolous as determined by what a *reasonable attorney [or party]* would have known or should have known under the same or similar circumstances." ***Stern***, 185 Wis. 2d at 241. This involves a mixed question of law and fact. ***Id.*** Determining what was known or should have been known involves questions of fact. ***Id.*** Such findings of fact will not be upset unless they are against the great weight and clear preponderance of the evidence. ***Id.*** However, the ultimate conclusion on whether what was known or should have been known supports a determination of frivolousness under para. (3)(b) is a question of law, which we review de novo. ***Id.***

¶36 A claim is not frivolous merely because there is a failure of proof, nor is a claim frivolous merely because it was later shown to be incorrect or

because it lost on the merits. ***Id.*** at 243. However, a claim or defense cannot be reasonably made, even though possible in law, if there is no set of facts which could satisfy the elements of the claim or defense, or if the party knew or should know that the needed facts do not exist or cannot be developed. ***Id.*** at 243-44.

¶37 In the context of this case, the question under WIS. STAT. § 814.025(3)(b) is what facts did Elizabeth know or what facts should she have known with reference to contesting Ray's motion for a change of physical placement. These facts must be assessed against the burden of proof required by law for her to prevail in opposing that motion; the court must determine whether the evidentiary facts available to her provide any reasonable basis to meet her burden of proof. ***Stern***, 185 Wis. 2d at 244-45. In this case, as the moving party, Ray had to make the showings established in WIS. STAT. § 767.325(1)(b), and his burden is affected by which presumption, if any, applies. *See* footnote 3. That, in turn, affects the standard against which the facts Elizabeth knew or should have known must be judged.

¶38 We recognize that this is a complicated analysis when the matter in controversy between two parents is the physical placement of their child. The "best interest" standard is not capable of precise definition, the discretion granted the trial court may allow for a range of reasonable outcomes on the same facts, and much of the evidence comes from the parents' testimony, which is shaped by their emotional involvement in the controversy. Nevertheless, in order to affirm a trial court's award of attorney fees under § 814.025(3)(b) in a physical placement dispute, we must have factual findings, supported by the record, sufficient to permit us to conclude that as a matter of law, those findings fulfill the standard established by para. (3)(b).

¶39 The trial court's finding of "objective bad faith" and other comments indicate it may have been finding that Elizabeth's position did not have a reasonable basis under WIS. STAT. § 814.025(3)(b) because she knew or should have known that the evidence did not exist to support her position. However, we are uncertain of this because "bad faith" is not used in para (b) but in para. (a). If the court were making a determination under § 814.025 rather than overtrial, since the $2,500 does not correspond to the total fees Ray incurred, it appears either the court decided Elizabeth's position in the proceedings had not been entirely frivolous, or her ability to pay or other factors did not warrant that she pay all his fees, but we are unable to tell which, if either, was the basis for that decision.

¶40 The reference to the guardian ad litem's report and the assessment against Elizabeth of all the guardian ad litem fees since November 9, 1998, suggest the court may be finding on that date Elizabeth knew or should have known the facts to support her opposition to Ray's motion did not exist or could not be developed. However, we can find no written guardian ad litem report, and the brief minute sheet of the November 9, 1998 status conference does not make clear what Elizabeth was told on that date. The guardian ad litem's oral recommendation to the court at the close of the February 9, 1998 hearing does not provide enough information to tell us what Elizabeth knew or should have known earlier.

¶41 Similarly, since there was no report prepared by the family court counseling service, and no study done, we do not see from the record when Elizabeth was informed of the counselor's recommendation or informed of what Aleta told the counselor in the meeting between February 2 and February 9. Elizabeth asserts in her brief that she did not know what the counselor's recommendation would be until February 9, and the record does not indicate

otherwise. In addition, the family court counselor's testimony was directed primarily to Aleta's demonstrated preference to live with her father, Aleta's attitude that she was going to do what she wanted to, her parents' inability to resolve conflicts concerning Aleta, and the damage this had caused to Aleta. While, as we have indicated earlier in the decision, this testimony provides support for the trial court's decision on placement, it does not support a finding that Elizabeth knew or should have known that opposing this recommendation was frivolous within the meaning of WIS. STAT. § 814.025(3)(b).

¶42 We are mindful of the lengthy litigation between Elizabeth and Ray concerning their daughter and the toll this has taken on all involved. However, we are unable to answer the questions we have about the basis of the court's order on attorney fees with confidence, in spite of having spent considerable time studying the record and the parties' briefs. We are persuaded that we must remand the matter of attorney fees to the trial court. If the court decides to award attorney fees, it must specify the ground or grounds for an award and make the findings necessary to support the award under the particular statute or case authority. In doing so, the court should bear in mind that Elizabeth's failure to accept the guardian ad litem's recommendation and the counselor's recommendation is not, in itself, frivolous or overtrial.

¶43 We reach the same conclusion with respect to the order that Elizabeth pay all the guardian ad litem fees incurred since November 9, 1998. The court has the authority under WIS. STAT. § 767.045(6) to order either party to pay any or all of the guardian ad litem's fees, and the court's allocation of the fees is a decision committed to its discretion. However, as with attorney fees, we see no indication that the court based this decision on Elizabeth's ability to pay or Ray's

need, and we are uncertain whether the court was relying on WIS. STAT. § 814.025 or overtrial and uncertain of the factual basis for either ground.

¶44 In summary, we affirm the trial court's decision on physical placement, decision-making, and child support. We do not address Elizabeth's challenge to the order that she deposit $1,000 for guardian ad litem fees as a condition for contesting Ray's motion because it is moot. We reverse the trial court's decision insofar as it orders Elizabeth to contribute $2,500 to Ray's attorney fees and to pay the guardian ad litem fees since November 9, 1998, and remand for further proceedings on those issues consistent with this opinion.

Motion

¶45 Ray has moved that we determine Elizabeth's appeal frivolous under WIS. STAT. § 809.25(3). This statute applies only if the entire appeal is frivolous. ***Lenhardt v. Lenhardt***, 2000 WI App 201 ¶16, 238 Wis. 2d 535, 618 N.W.2d 218, *review denied*, 2000 WI 121, ___ Wis. 2d ___, 619 N.W.2d 93 (Wis. Oct. 17, 2000). Since we have concluded we must reverse and remand the issues of attorney fees and obligation for guardian ad litem fees, the entire appeal cannot be frivolous. We therefore deny the motion.

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

Not recommended for publication in the official reports.