COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP409 **Cir. Ct. No. 2002FA1441**

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

IN RE THE MARRIAGE OF:

GEORGE B. FUREY, JR.,

PETITIONER-RESPONDENT,

V.

CLARINE A. FUREY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Clarine A. Furey appeals from a post-divorce order dealing with issues of physical placement of the children, child support, and

maintenance. We conclude that the circuit court properly exercised its discretion on these issues. We affirm the order.

¶2 Clarine and George Furey were married in 1983, separated in 2000, and divorced in 2004. They have two sons. The March 29, 2004 judgment of divorce was based on a marital settlement agreement. George was ordered to pay $1,900 a month family support to Clarine with child support and maintenance left open. Joint legal custody was awarded and under the physical placement schedule, the boys are with Clarine every Thursday overnight to Friday morning and alternate weekends. The parties agreed that the placement schedule was an interim arrangement in light of the family court counselor's recommendation that Clarine could seek an expansion of her placement once she successfully completed treatment of her obsessive compulsive disorder (OCD) and overcame its associated symptoms.[1] The case was set for review in ninety days.

¶3 At an evidentiary hearing on October 29, 2004, the circuit court considered de novo the issues of physical placement, child support, and maintenance. The court did not change the physical placement schedule, finding it to be in the best interests of the children. It authorized George to alter or suspend the physical placement schedule if there is a reasonable and substantial basis to do so. No child support was ordered but George is required to pay the children's variable expenses. The parties will split uninsured medical expenses that exceed

[1] Clarine's obsessive compulsive disorder resulted in hoarding behavior and excessive clutter in her home. The condition of the home was deemed a risk to the children. Presumably to accommodate Clarine's opportunity to move for greater placement, the parties agreed to waive the application of WIS. STAT. § 767.325(1)(a) (2003-04), concerning the applicable standard to obtain a modification of physical placement within two years of the initial order regarding physical placement. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

$2,000 a year. The court awarded maintenance to Clarine of $2,000 a month for fifteen years.

¶4 We first address Clarine's challenge to the physical placement schedule and George's right to suspend or limit visitation. 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 and reasonable decision. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Placement of a minor child must be consistent with his or her best interest. *See* WIS. STAT. § 767.24(5). The determination of what is in a child's best interest is a mixed question of law and fact. *See* ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992). We will not disturb the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). The circuit court, as the finder of fact, is entitled to judge the credibility of the witnesses and we are required to give due regard to the opportunity of the trial court to judge such a matter. *See* ***Hughes v. Hughes***, 148 Wis. 2d 167, 171, 434 N.W.2d 813 (Ct. App. 1988).

¶5 Clarine argues that the circuit court ignored the parties' recommendations. She asked for equal periods of physical placement. The guardian ad litem recommended a small expansion of physical placement with Clarine, and George accepted that recommendation. Clarine also contends that the circuit court ignored evidence that she had made improvements to the condition of her home.

¶6 The record stands in contrast to Clarine's contentions. The circuit court acknowledged the parties' recommendation and specifically addressed why

it was not adopting either recommendation. It found Clarine's OCD to be a serious illness which had a substantial negative impact on the children in the past. It recognized that Clarine's OCD symptoms had improved but that she had not completed treatment. It found that her progress was not "self-actuated" but was compelled only by the press of legal proceedings. It found that there should have been greater improvement in all areas of the house given the length of time Clarine had to work on clearing out the clutter. The court was not confident that the cleaned areas of the house would remain so and could not trust Clarine's self-reporting that it would. The court was concerned about the potential impact Clarine's OCD would have on the children if she did not fully address it. The court's ruling on Clarine's motion for reconsideration confirmed that it was not just concerned about the condition of the home but about Clarine's overall mental health.

¶7 The circuit court found that the children were happy and successful with the existing placement arrangement. It specifically found George trustworthy in terms of maintaining the children's relationship with Clarine. The circuit court properly exercised its discretion in determining that the physical placement schedule was in the children's best interests.

¶8 With respect to authorizing George to suspend or limit physical placement, the circuit court recognized that it was an extraordinary provision. However, the court explained that it was putting that mechanism in place because of uncertainty regarding Clarine's ability to maintain an acceptable home and because George was trustworthy in terms of facilitating the children's relationship with Clarine. The circuit court provided that Clarine could bring a motion to review whether George had a reasonable or sustainable basis for altering the physical placement schedule. The circuit court also required monthly visits by a

third person to report to George whether Clarine's home was being reasonably maintained as appropriate for the children.

¶9 The circuit court is authorized to make such provisions it deems just and reasonable concerning physical placement. WIS. STAT. § 767.24(1). The cases Clarine cites deal with a permanent prospective change in placement without substantial evidence that the change is necessary.[2] Those cases do not apply here where only a temporary safety measure was put in place. We are convinced that the unusual circumstances justify the extraordinary measure of allowing George to withhold physical placement on an emergency basis.

¶10 Clarine complains that allowing George to suspend physical placement in his discretion denies her due process, specifically the right to notice and opportunity to be heard. Here the best interests and safety of the children are paramount. Due process is "flexible and calls for such procedural protections as the particular situation demands." ***Morrissey v. Brewer***, 408 U.S. 471, 481 (1972). The law permits unilateral temporary action in exigent circumstances with a post-action hearing sufficient to satisfy due process. *See*, *e.g.,* WIS. STAT. § 48.19(1)(d)5. (law enforcement officer may take a child into custody if the child is suffering from illness or injury or is in immediate danger); WIS. STAT. § 48.42(1m)(b) (court may issue an ex parte temporary order terminating visitation or contact by a parent whose parental rights are sought to be terminated); WIS.

[2] *See* ***Koeller v. Koeller***, 195 Wis. 2d 660, 667, 536 N.W.2d 216 (Ct. App. 1995) (court lacks authority to change custody at an unknown time in the future upon occurrence of a predetermined contingency); ***Schwantes v. Schwantes***, 121 Wis. 2d 607, 627, 360 N.W.2d 69 (Ct. App. 1988) (erroneous exercise of discretion to order automatic transfer of custody upon mother's failure to meet condition of terminating a relationship with a certain man); ***Groh v. Groh***, 110 Wis. 2d 117, 130, 327 N.W.2d 655 (1983) (erroneous exercise of discretion to order change of custody if the mother failed to move within fifty miles of father's home).

STAT. § 51.15 (providing for emergency detention of the mentally ill, drug dependent or developmentally disabled); WIS. STAT. § 343.305(9)(a) (person's driver's license is immediately taken into possession if the person refuses to submit to a chemical test); WIS. STAT. RULE 809.12 (appellate court may issue ex parte order granting temporary relief pending a ruling on a motion for relief pending appeal); WIS. STAT. § 813.025(2) (ex parte restraining order when irreparable loss or harm may occur); and WIS. STAT. §§ 813.12(3)(b), 813.122(4)(b), 813.123(4)(b), 813.125(3)(b) (temporary restraining order may be ordered without notice to the respondent in cases involving domestic abuse, child abuse, vulnerable adults, and harassment). If George suspends or limits placement on a temporary basis, Clarine may obtain a review hearing. The post-action hearing adequately protects Clarine's due process rights.

¶11 Clarine argues that the circuit court erroneously exercised its discretion in not ordering George to pay her $439 per month in child support as calculated under the shared-placement formula of the percentage of income standards. Although the circuit court is required to determine child support according to the percentage of income standards, it has discretionary authority to set aside the percentage calculation when it finds that use of the calculation "is unfair to the child or to any of the parties." *See* WIS. STAT. § 767.25(1m); *see also* ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 295, 544 N.W.2d 561 (1996). When this court reviews such decisions, we determine if the court examined the relevant facts, applied the correct standards and reached a demonstrated rational decision. ***Id***. at 294.

¶12 The circuit court determined that application of the percentage of income standard was unfair because it failed to account for the health insurance premiums that George pays. The court made George responsible for all of the

children's variable expenses and up to $2,000 in uninsured medical expenses so that the parties would have less conflict over such expenses. That George was paying these expenses out of pocket was an additional reason why child support under the percentage of income standard was unfair. The court also split the tax exemptions between the parties. These were appropriate factors to consider in determining that the percentage standard was unfair. *See* ***Rumpff v. Rumpff***, 2004 WI App 197, ¶16, 276 Wis. 2d 606, 688 N.W.2d 699 (proper exercise of discretion to deviate from percentage standard to avoid future litigation over the variable expenses); WIS. STAT. § 767.25(1m)(f), (h), (i) (court may consider the health insurance costs, tax consequences, and any other relevant factors). The court's decision to hold child support open was a proper exercise of discretion.[3]

¶13 The final issue pertains to the maintenance award. Maintenance determinations are discretionary with the circuit court, and we will not reverse absent an erroneous exercise of that discretion. ***Grace v. Grace***, 195 Wis. 2d 153, 157, 536 N.W.2d 109 (Ct. App. 1995). We look to the court's explanation of the reasons underlying its decision and where it appears that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision as a proper exercise of discretion. *See* ***id.*** The starting point of the analysis in reviewing a maintenance award is the list of statutory factors enumerated in WIS. STAT. § 767.26, which are designed to further the two

[3] The guardian ad litem urges this court to adopt a rebuttable presumption that the application of the percentage of income standard is unfair when it results in the parent having more than fifty percent physical placement being obligated to pay the other parent child support. Since the circuit court explained why it was not following the percentage of income standard, we need not address whether a rebuttable presumption should exist.

objectives of maintenance: support and fairness. ***Olson v. Olson***, 186 Wis. 2d 287, 292-93, 520 N.W.2d 284 (Ct. App. 1994)

¶14 Citing ***King v. King***, 224 Wis. 2d 235, 252, 590 N.W.2d 480 (1999), Clarine argues that the circuit court neglected to adequately explain how its findings as to the statutory factors under WIS. STAT. § 767.26 resulted in the award of $2,000 monthly maintenance for fifteen years. She also contends the circuit court failed to recognize that the equal division of the parties' combined income stream (including income imputed to her) was the starting point and the only result which meets the fairness and support objectives of maintenance. She points out that the maintenance award leaves a disparity in the parties' monthly disposable income of $1,841 in George's favor.

¶15 We are not persuaded that the circuit court failed to provide a rational basis for the maintenance determination. Indeed, the court acknowledged that equal division of the combined income stream was an appropriate starting point. It also explained that Clarine had brought a college education and work experience to the marriage so that it was not a situation where one spouse sacrificed education or career for the sake of the marriage.

¶16 The circuit court went through the factors in WIS. STAT. § 767.26. It found that Clarine, at age 50, has a substantial period of working years left to re-establish her career and earn and save money. It pointed out that as a result of the property division, Clarine owns her home, valued at $400,000, free and clear of debt. She also received more than $80,000 in cash and $225,000 in retirement interests. The court found that she had a very good start in preparing for retirement. It found that Clarine was able to maintain the marital standard of living while receiving maintenance of $1,900 a month with very little invasion of

her savings. It concluded she would be able to achieve the marital standard of living on her own income within several years. These findings all relate to Clarine's need for support. The court chose fifteen years as the limit on maintenance to give Clarine time to prepare for retirement and incentive to take responsibility for her own retirement.

¶17 The circuit court determined that the limit of fifteen years on maintenance was fair to George because he then would be approaching retirement age and should be free of the burden of supporting Clarine. The court explained the tax consequences of its maintenance decision. It also tied in the child support determination concluding that it would be unfair to George to equalize the parties' incomes when George is in effect applying twenty-five percent of his income to support the children when they are with him. These findings relate to the fairness component of maintenance. The court made mathematical calculations which support its decision and we need not detail them here. In short, we are not left to wonder why maintenance was set at $2,000 a month or limited to fifteen years. The court properly exercised its discretion.

By the Court.—Order affirmed.

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