COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1948

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

IN RE THE MARRIAGE OF:

PAUL FAUST,

PETITIONER-RESPONDENT,

v.

CYNTHIA JOHNSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed.*

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

PER CURIAM. Cynthia Johnson appeals pro se from an order modifying aspects of child custody and child support following her divorce from Paul Faust. We conclude that the circuit court properly exercised its discretion in ordering the changes. We affirm the order.

Johnson and Faust were divorced by a judgment of divorce entered on September 15, 1993.[1] Pursuant to the parties' stipulation made December 7, 1992, the judgment awarded joint legal custody of the parties' only child[2] and primary physical placement to Johnson. An order entered April 1, 1994, further documented the parties' 1992 stipulation by amending the judgment of divorce to include the provision that Johnson be granted sole custody on medical issues and that the parties shall raise the child as a Lutheran. Faust was ordered to pay child support in the amount of seventeen percent of his income.

On December 16, 1994, Johnson filed an order to show cause against Faust for contempt for alleged violations of court orders regarding physical placement, no contact and payment of property settlement. Johnson sought a new custody study and to "relieve the minor child … of periods of physical placement with his father until his father obtains appropriate counseling." On February 16, 1995, Faust filed an order to show cause against Johnson for contempt for interference with periods of physical placement. Faust sought an order setting future periods of physical placement. After initial hearings on the pending matters, on May 9, 1995, the circuit court ordered the parties to initiate family counseling, adopted the interim recommendation from the family court counselor regarding periods of physical placement through December 1995, and ordered the "unresolved placement issues" to be the subject of a new custody study. On July 14, 1995, Faust filed a motion to modify legal custody and physical

[1] The judgment was captioned as "Partial Findings of Fact, Conclusions of Law, and Judgment of Divorce" because the specific issues of business evaluations, maintenance and payment of evaluation fees were to be determined at a future hearing. The remaining issues in the divorce were resolved at a series of hearings conducted between 1994 and 1996.

[2] A son was born to the marriage on September 27, 1987.

placement. He sought sole legal custody and primary placement based on the allegation that Johnson was interfering with Faust's relationship with his son and engaging in a course of medical treatment that was contrary to the child's best interests and perhaps harmful to the child.

The issue of custody was heard on October 24 and November 7, 1995. On November 17, 1995, the circuit court ruled that there would continue to be shared legal custody but that periods of physical placement would alternate weekly between Johnson and Faust.[3] The decision on whether one party would be granted the sole right to make medical decisions was deferred until after the child was examined by a court-appointed allergist. The court also ordered that Johnson contact a psychologist or psychiatrist for evaluation and any recommended treatment. The court allowed each parent to provide whatever religious training the parent deemed appropriate without disparaging any religious training provided by the other parent. At a hearing on January 26, 1996, the court granted Faust the sole authority for making medical decisions regarding his son. Orders of February 8 and 16, 1996, documented the circuit court's rulings.

During the summer of 1996, the issue of child support was litigated. The parties filed cross-motions to compel discovery. Johnson was ordered to participate in a vocational evaluation and contact the Children First program for job search assistance. On May 15, 1997, an order was entered finding that Johnson's earning capacity was $139,724 per year. Faust's child support obligation was terminated.

[3] The circuit court had adopted a gradual plan to effectuate its order for nearly equal periods of physical placement. Thus, the child remained with Johnson for a greater period of time until June 1996.

On appeal, Johnson attacks the increased periods of physical placement awarded to Faust, the removal of medical custody from her and the appointment of an allergist to evaluate the child. She first claims that Faust's motion for a change in custody and placement should have been dismissed because it was not properly served on her.[4] This claim is a nonstarter because the issue of child custody was already in litigation between the parties as a result of Johnson's December 16, 1994, order to show cause. In May 1995, the court ordered a new custody study. At the September 15, 1995 hearing where Johnson stated that she had not been served with Faust's motion, Johnson acknowledged that "back in December I asked for sole legal custody." Because custody was open before the court, it could increase Faust's periods of physical placement even without Faust's formal motion. Johnson was not prejudiced by the failure of service, if any. *See* § 805.18(2), STATS.

We turn to the modification itself. Whether to modify a placement or custody order is directed to the circuit court's discretion. *See* ***In re Stephanie R. N.***, 174 Wis.2d 745, 764, 498 N.W.2d 235, 241 (1993). We affirm that determination when the court applies the correct legal standard to the facts of record and reaches a reasonable result. *Cf.* ***Kerkvliet v. Kerkvliet***, 166 Wis.2d 930, 938-39, 480 N.W.2d 823, 826 (Ct. App. 1992).

Johnson argues that because Faust's modification motion came within two years of the "accurate entry of the initial custody and placement order

[4] Johnson's argument refers to "service" generically, and, therefore, it is not clear whether Johnson contends that Faust's motion be served on her personally. We note that the order of March 6, 1995, resulting from a hearing held on February 21, 1995, required that there be no contact between the parties by facsimile and that "service of process for any future judicial proceedings shall be by process server." Neither party argues the application of this provision.

on April 1, 1994," a modification could be made only upon a showing that modification is necessary to prevent physical or emotional harm to the child. *See* § 767.325(1)(a), STATS.[5] However, the parties stipulated to the custody arrangement on December 7, 1992. That stipulation determined with finality the custody issue even though the divorce proceedings continued because other matters were in dispute. *See* ***Keller v. Keller***, 214 Wis.2d 32, 37-38, 571 N.W.2d 182, 184-85 (Ct. App. 1997). When Johnson sought a new custody study by her order to show cause filed on December 16, 1994, and Faust subsequently sought modification of the placement arrangement, the two-year "truce period," *see* ***Stephanie R. N.***, 174 Wis.2d at 764, 498 N.W.2d at 240-41, had expired. Modification could be made upon a showing of a substantial change in circumstances and in the best interests of the child under § 767.325(1)(b)1.

In reviewing a circuit court's determination on physical placement and custody, we accept the court's factual findings unless they are clearly erroneous. *See* ***Brandt v. Witzling***, 98 Wis.2d 613, 618, 297 N.W.2d 833, 836 (1980); *see also* § 805.17(2), STATS. Not until her reply brief does Johnson attack the circuit court's finding that there was a substantial change in circumstances.[6] It

[5] Section 767.325(1)(a), STATS., provides that a court may not modify an order of legal custody or substantially modify physical placement within two years of its initial order, "unless a party seeking the modification, upon petition, motion, or order to show cause shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child." Orders determining legal custody and physical placement may be revised two years or more after an existing order is entered if the circuit court finds that the "modification is in the best interest of the child" and "[t]here has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement." Section 767.325(1)(b)1.

[6] Generally this court need not address an issue raised for the first time in a reply brief. *See* ***Schaeffer v. State Personnel Comm'n***, 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989). Moreover, Johnson's statement in her reply brief that a substantial change of circumstances was not shown is undeveloped and need not be addressed. *See* ***Gardner v. Gardner***, 190 Wis.2d 216, 239 n.3, 527 N.W.2d 701, 709 (Ct. App. 1994).

is sufficient to note that the record supports the circuit court's finding of the following changed circumstances: the child was older and had developed the ability and responsibility to initiate a relationship with his father, Faust had made significant efforts to improve his parenting abilities, Johnson had engaged in a pattern of conduct which was excluding Faust from a relationship with the child.

The circuit court found that increasing Faust's periods of physical placement and changing medical custody were in the child's best interests. It found that without the increased periods of physical placement, the father-son relationship was in peril of being extinguished forever. It found that the child was a victim of Johnson's own health concerns. The court noted that the child has "a level of sophistication concerning medical problems that … outscripts most adults and that because of that he lives in great fear." It found no support in the record for Johnson's claim that the child suffered a number of food allergies. It specifically found that the unusual diet that Johnson insisted on was harmful to the child because it causes the child to be alienated from his peers. The court found that if this state of affairs continues, "there will be clear, definitive emotional harm" to the child.[7]

Johnson argues that the testimony of the court-appointed allergist does not support the circuit court's findings. While part of the allergist's testimony may be interpreted as Johnson suggests, the allergist also highlighted how Johnson's inability to objectively observe the child's food reactions clouds the entire issue. The circuit court decides the credibility of the witnesses; when

[7] Not only do the circuit court's findings satisfy the best interests standard in § 767.325(1)(b), STATS., they are also sufficient to support a change under the higher burden in § 767.325(1)(a) that a change is necessary because the current custodial conditions are physically or emotionally harmful to the best interests of the child.

more than one reasonable inference may be drawn from the credible evidence, we accept the inference drawn by the trial court. *See* ***Brandt***, 98 Wis.2d at 619, 297 N.W.2d at 836. Also, the medical records and report from another doctor support the finding that the child did not suffer from the food allergies Johnson ascribed to the child. It is the circuit court's role to weigh the evidence, including expert testimony, and resolve conflicts in the evidence. *See* ***id.***

Johnson points out that the court-appointed psychologist, Dr. Marc Ackerman, recommended continued primary placement with Johnson because the child was afraid of Faust. She claims that the evidence from Ackerman supports a finding that any placement with Faust is harmful to the child. It is true that Ackerman found that Faust was manipulating a claim of posttraumatic stress disorder and that Faust's anger caused the child fear. However, the circuit court was not bound by Ackerman's opinion. Ackerman also acknowledged that Johnson's bitterness was eroding the child's relationship with Faust. The trier of fact may accept certain positions of any expert's testimony while rejecting others. *See* ***State v. Owen***, 202 Wis.2d 620, 634, 551 N.W.2d 50, 56 (Ct. App. 1996). Moreover, there was other evidence in the record supporting the circuit court's finding that Faust had made significant advances in his parenting skills and that additional placement with Faust was necessary to foster the father-son relationship.[8] We give deference to the circuit court's evaluation of the psychological profile of the parents. *Cf.* ***Wiederholt v. Fischer***, 169 Wis.2d 524, 531, 485 N.W.2d 442, 444 (Ct. App. 1992). The decision to increase periods

[8] Faust's therapist testified that Faust was now able to sacrifice his own needs and put the child's needs first. The custody study recommended equal placement. That was also the recommendation of the guardian ad litem.

of physical placement with Faust and give Faust medical custody was a proper exercise of discretion.

Johnson maintains that the circuit court had no basis to appoint an allergist to evaluate the child, but she fails to develop an argument that the circuit court erroneously exercised its discretion in doing so. We need only briefly respond to the undeveloped contention. *Cf.* ***Gardner v. Gardner***, 190 Wis.2d 216, 239 n.3, 527 N.W.2d 701, 709 (Ct. App. 1994) (where an issue is inadequately briefed, the court of appeals will not independently develop an argument). It is obvious from the record that the parties disagreed about whether the child actually suffered from food allergies. We view the appointment of a neutral expert to assist the court as an entirely appropriate step. *See* § 907.06, STATS. (governing the court appointment of experts).

Johnson next attacks what she deems as the circuit court's reversal of the parties' stipulation regarding the child's religious upbringing. The circuit court did not reverse the provision that the child be raised as a Lutheran. Rather, it refused to direct Faust to provide religious instruction and simply left the choice of religious training to each parent's discretion during the time that the child enjoys physical placement with that parent. The provision gives full respect to each parent's right to choose the type of religious instruction as directed in ***Gould v. Gould***, 116 Wis.2d 493, 504, 342 N.W.2d 426, 432 (1984), which Johnson cites. The provision was more a result of the parties' inability to communicate and find common ground in child rearing. It was appropriate to fend off future conflict between the parents.

As part of its postjudgment order, the circuit court ordered that the child would remain in his present school, but that if Johnson moved, the child was

to be enrolled in the school appropriate for Faust's residence. Johnson argues that this provision is improper because the circuit court is not allowed to control future contingencies. Faust contends that Johnson raises this issue for the first time on appeal. Johnson does not refute that contention in her reply brief. We deem the claim of waiver confessed. *Cf.* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). Even if we were to address Johnson's claim, we would conclude that the provision regarding school enrollment was an appropriate exercise of discretion. *See* § 767.24(1), STATS., (the court "shall make such provisions as it deems just and reasonable concerning the legal custody … of any minor child of the parties."). The provision was an attempt to foreclose one more point of contention between the parties and send the message that any continued efforts by Johnson to hamper the custody arrangement would not be tolerated.[9]

Johnson argues that there was no basis stated for the circuit court's order that she consult with a licensed psychologist or psychiatrist and engage in "personal therapy." We have already noted the circuit court's finding that Johnson engaged in a pattern of conduct that was excluding Faust from a relationship with the child. Whether Johnson's anger toward Faust was justified or not, the circuit court found that she needed help in dealing with it so as to enable her to co-parent the child. Again, the order was within the circuit court's discretion to protect the best interests of the child. Moreover, Johnson stated at the November 7, 1995 hearing that "I am willing to pursue counseling." Johnson led the circuit court to

[9] We acknowledge that ***Koeller v. Koeller***, 195 Wis.2d 660, 667, 536 N.W.2d 216, 219 (Ct. App. 1995), held that there is no authority for a circuit court to "order a change of custody that is to take place at some unknown time in the future, upon the occurrence of some stated contingency." The circuit court's provision here is not a prospective transfer of custody.

believe that counseling was not objectionable. It is well established that where a party has induced certain action by the circuit court, he or she cannot later complain on appeal. *See* ***Zindell v. Central Mut. Ins. Co.***, 222 Wis. 575, 582, 269 N.W. 327, 330 (1936).

The circuit court's order that Johnson participate in a vocational evaluation and contact the Children First program for job search assistance is also challenged. Johnson contends that the order was an unwarranted invasion of her privacy "absent any testimony on the record establishing either her present employment status and the need for such participation and examination." Johnson's citation to § 767.295, STATS., is not relevant because that section pertains to requiring a noncustodial parent to register for a work experience and job training program. Johnson was not a noncustodial parent. The circuit court's authority for the order did not come from § 767.295 but from the litigation over child support.

It may be that at the July 25, 1996 pretrial conference, where the circuit court made the order for vocational evaluation and assistance, there was not direct evidence about Johnson's employment status.[10] However, the circuit court was not operating in an evidentiary vacuum. The record includes Johnson's April 8, 1996 motion for a waiver of transcript fees for an appeal Johnson commenced.[11] The affidavit in support of the motion claimed that Johnson was indigent and that her 1996 year-to-date gross income from "musical activities"

[10] The pretrial conference was not recorded.

[11] Johnson filed a notice of appeal from the circuit court's February 9, 1996 postjudgment order changing medical custody and the February 16, 1996 order on custody and physical placement. Because child support and other matters were still pending in the circuit court, the appeal, No. 96-0890, was dismissed on May 7, 1996, as taken from a nonfinal order.

was only $650 and that she had no salary from the business she formerly operated. By an order rendered May 22, 1996, the circuit court denied the request for a transcript fees waiver upon concluding that Johnson was not indigent and that she "has made certain choices which have resulted in her current financial circumstances, notably failing to pursue gainful employment." Although a different circuit court judge was assigned to hear and determine the pending child support issue,[12] the finding that Johnson had failed to pursue gainful employment and her sworn affidavit of her financial circumstances were already of record. There was a basis for the pretrial order requiring Johnson to submit to a vocational evaluation and assistance.

The next issue revolves around the circuit court's finding that Johnson's earning capacity was $139,724. This finding was, in part, a sanction for Johnson's failure to submit to the vocational evaluation. Johnson was not allowed to challenge the vocational expert's opinion as to her earning capacity.

Johnson argues that it was improper for the court to impose a sanction when she had filed a motion for reconsideration from the November 1, 1996 order which reiterated the requirement that she submit to a vocational evaluation. Faust's motion for a sanction was heard on April 8, 1997.[13] Although Johnson asked that her motion for reconsideration be addressed first, without reason she indicated that she was not ready to proceed on the motion for reconsideration. This was more than five months after the request for

[12] Waukesha County Circuit Court Judge Donald J. Hassin, Jr., heard and determined the custody issue and denied Johnson a transcript fees waiver. In June 1996, Judge James R. Kieffer was assigned to the case and he conducted a pretrial conference on July 24, 1996.

[13] In December 1996, the case was assigned to Waukesha County Circuit Court Judge Patrick C. Haughney.

reconsideration was filed. Given the gross delays in resolving the long pending issues and the circuit court's inherent authority to control its calendar, we conclude that it was not error for the circuit court to proceed on Faust's motion for a sanction.

A discovery sanction involves the exercise of discretion and will not be disturbed absent an erroneous exercise of discretion. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). The circuit court found that Johnson was aware of the two orders requiring her to submit to the vocational evaluation. It also noted how her failure to comply with the court order resulted in a lack of information on which the vocational expert could base an opinion. The circuit court noted its belief that Johnson's failure to submit to the required evaluation was motivated in part by a desire to impede the truth-finding function which was to occur at trial. The circuit court properly exercised its discretion in precluding Johnson from challenging the vocational expert's opinion.[14]

The finding of Johnson's earning capacity is not clearly erroneous. The circuit court determined that Johnson's claimed actual income resulted in employment at less than minimum wage. The vocational expert indicated that Johnson's earning capacity ranged between $54,600 to $139,724. Johnson had been engaged in the type of business in which Faust earns $70,000 annually.

[14] Johnson claims that the circuit court erred in not ordering Faust to produce certain financial documents requested during discovery. The circuit court did order Faust to produce his checkbook register, canceled checks or bank statements if he had them. Faust maintained that he did not possess those items. As the circuit court aptly noted, it could not compel the production of items Faust did not have. The circuit court properly exercised its discretion on Johnson's motion to compel discovery.

We summarily reject Johnson's claim that the circuit court's refusal to order Faust to pay additional child support for the period of January 1, 1995, to July 31, 1996, imposes a retroactive child support obligation on her.[15] Johnson was not required to pay Faust anything.

Johnson contends that she is entitled to interest on the adjustment payment of child support. *See supra* n.15. We need not address this claim because the circuit court determined that Faust did not owe additional support for 1995 or 1996. Indeed, the court noted that Faust had probably overpaid support since his motion for a modification because Johnson had an equal, if not higher, earning capacity and an equal time placement schedule was in place as of June 1996.

By the Court.—Order affirmed.

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

[15] The judgment of divorce set Faust's child support obligation at $653.40 per month based on Faust's 1992 income. By April 1 each year thereafter, Faust was to make an adjusting payment that would make his total child support payment equal to seventeen percent of his actual income for that year. An order of June 27, 1995, moved to August 15 the time when the adjusting payment was to be made. Because custody and physical placement were pending, an order of September 27, 1995, set support at $653.40 monthly "until further order of the court."