COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2207

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

IN RE THE MARRIAGE OF:
JEFF P. BRINCKMAN,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

MAURA BRINCKMAN WEHRENBERG,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Crawford County: ROBERT W. WING, Judge. *Affirmed.*

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

DYKMAN, P.J. Ms. Wehrenberg (formerly Mrs. Brinckman), appeals from an order holding that Jeff Brinckman did not shirk his child support responsibilities when he closed his law practice in Onalaska and moved to Prairie

du Chien. She contends that the trial court erroneously exercised its discretion regarding procedure when it did not: (1) allow her to testify under oath in the same manner that it permitted Mr. Brinckman to testify; and (2) order Mr. Brinckman to produce certain business and financial records, which she had subpoenaed. We reject these assertions and affirm.

Mr. Brinckman cross-appeals. He alleges that the trial court erroneously exercised its discretion when it: (1) found that he did not pay his share of the children's medical expenses; (2) did not re-establish his weekday placement privileges; and (3) appointed a guardian ad litem to mediate placement disputes between the parties. We reject these arguments and affirm.

BACKGROUND

Mr. Brinckman and Ms. Wehrenberg had two children, Robert, who was born on October 5, 1987, and Bridget, who was born on February 9, 1989. They were granted a divorce on June 26, 1991. Under their stipulation, which was approved by the trial court and incorporated into the divorce judgment, the parties agreed to joint custody of the children with Ms. Wehrenberg having primary physical placement. Mr. Brinckman was to receive physical placement of the children every Tuesday, Thursday, every other weekend, alternating holidays, and sixteen days during the summer. He also was to pay twenty-five percent of his gross income as child support.

In April 1995, Ms. Wehrenberg informed Mr. Brinckman that she and the children were going to move approximately sixty miles from Onalaska to Prairie Du Chien, so that she could take a job there. Mr. Brinckman filed a motion for a change in the primary placement of the two children.

In June 1995, Ms. Wehrenberg moved the children to Prairie du Chien, making weekday placement difficult for Mr. Brinckman. There is evidence that she failed on several occasions to take the children to Onalaska to visit Mr. Brinckman, and often would not allow Mr. Brinckman to pick them up for visits. Mr. Brinckman responded by filing a contempt motion. Prior to the motion hearing, the trial court appointed Attorney Gerald Wright to act as the children's guardian ad litem, and it also appointed Dr. Beverly Bliss, Ph.D., to conduct psychological evaluations of Mr. Brinckman, Ms. Wehrenberg and their two children.

On September 18, 1995, a hearing was held on both the primary placement motion and the contempt motion. Mr. Brinckman testified and presented evidence at the hearing. Ms. Wehrenberg, who was represented by counsel, did not testify or present any evidence. The trial court denied Mr. Brinckman's motion for a change in primary placement. It also eliminated Mr. Brinckman's Tuesday and Thursday placement privileges after reviewing Dr. Bliss's report in which she concluded that the high level of conflict between the parties was beginning to take its toll on the children, and that the conflict increased as the number of visits or exchanges increased.

On December 31, 1995, asserting that he wanted to be closer to his children, Mr. Brinckman closed his law practice in Onalaska and moved to Prairie du Chien, where he opened a law office. The move to Prairie du Chien caused Mr. Brinckman's income to drop significantly, which meant a decrease in the amount he paid in child support. On January 18, 1996, Ms. Wehrenberg filed a motion to increase Mr. Brinckman's child support payments. On January 22, 1996, Mr. Brinckman filed a motion to reinstate his Tuesday and Thursday placement privileges, arguing that such visitation was again feasible because of his

move to Prairie du Chien. On June 18, 1996, Ms. Wehrenberg, who was no longer represented by counsel, filed additional motions, alleging that Mr. Brinckman was shirking and that he had not paid his part of the children's medical bills.

A motion hearing was held on June 25, 1996. The trial court denied all the motions except the one concerning the medical bills, which it granted several months later. Ms. Wehrenberg appeals and Mr. Brinckman cross-appeals.

BACKGROUND

I. *Appeal*

Ms. Wehrenberg raises several issues in which she claims the trial court erroneously exercised its discretion. "A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law." ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). "Additionally, and most importantly, a discretionary determination must be a product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Id.*** We will not reverse a discretionary decision in a divorce action if the record discloses that discretion was in fact exercised and we can perceive a reasonable basis for the decision. *See* ***Metz v. Keener***, 215 Wis.2d 626, 631, 573 N.W.2d 865, 868 (Ct. App. 1997).

Ms. Wehrenberg asserts that the trial court erroneously exercised its discretion when it denied her shirking motion without allowing her an opportunity to testify under oath. While the trial court did not allow her to testify under oath in the same manner in which it allowed Mr. Brinckman to testify, it allowed her to

ask questions and introduce evidence as an advocate. When the trial court recognized that Ms. Wehrenberg was having difficulty proving her case, it advised her to focus on the critical issue of whether Mr. Brinckman moved to Prairie du Chien to avoid paying child support. It stated:

> So the question really is, is it reasonable for Mr. Brinckman to pick up and quit his law practice in La Crosse to move his practice and his residence to Prairie du Chien in order to be closer to his children? Now if you can prove, one, that he is not here because of his children, then that would show that that would be unreasonable. And if you can show that it is unreasonable for him to be closer to his children, and that, that making a move like that is unreasonable for him to be close to his children, then you have proved shirking. If you can't, you haven't proved shirking.

And while the trial court advised her of what she needed to prove, Ms. Wehrenberg did not offer any evidence to support her claim that Mr. Brinckman reduced his income in order to avoid paying child support. The trial court apparently decided that because she presented no other evidence as to Mr. Brinckman's motive, it was not necessary for her to testify as a witness on this issue.

While we are satisfied that the trial court gave Ms. Wehrenberg several opportunities to introduce evidence, it erroneously exercised its discretion when it did not permit her to testify in the same manner that it allowed Mr. Brinkman to testify. When a trial court erroneously exercises its discretion, we determine whether the error was harmless. Under § 805.18(2), STATS., a judgment shall not be reversed or set aside, for procedural errors, unless the errors affected the substantial rights of the party seeking to reverse or set aside the judgment.

We conclude that the trial court did not affect Ms. Wehrenberg's substantial rights when it did not allow her to testify. The evidence suggested that Mr. Brinckman moved to Prairie du Chien to be closer to his children, not to shirk his child support responsibilities. Ms. Wehrenberg presented no evidence to dispute this conclusion when she questioned Mr. Brinckman, and she does not tell us what evidence she would have produced if she had been given the opportunity to testify.

Ms. Wehrenberg also argues that the trial court erroneously exercised its discretion when it failed to provide her with Mr. Brinckman's business and personal financial records, which she had subpoenaed prior to the hearing.[1] She apparently subpoenaed these records to establish that Mr. Brinckman voluntarily reduced his income when he closed his law practice in Onalaska and moved to Prairie du Chien. However, that issue was not in dispute. Mr. Brinckman conceded that he voluntarily reduced his income when he closed his practice and moved to Prairie du Chien. The dispositive issue was whether his motive for reducing his income was to avoid paying child support.

While Ms. Wehrenberg may have been entitled to this information, it would not have helped her prove that Mr. Brinckman reduced his income to avoid paying child support. The trial court, as the trier of fact, was convinced that Mr. Brinckman's motive for moving was to be closer to his children; therefore, it

[1] Prior to the hearing, Ms. Wehrenberg filed a motion requesting that Mr. Brinckman provide various financial records regarding his law practice in order to establish shirking. Ms. Wehrenberg raised this issue at the hearing.

> **Ms. Wehrenberg**: The records that were subpoenaed, Your honor, do I get a copy of those?
>
> **The Court**: No. They haven't been supplied, there is no need for them. No.

concluded that the financial records were unnecessary. Even if the trial court erred, this information would have not altered the court's decision as to Mr. Brinkman's motive. Therefore, we conclude that the trial court's procedural errors were harmless.

II. *Cross-Appeal*

A. Medical Bills

In his cross-appeal, Mr. Brinckman asserts that the trial court erred by ordering him to pay one of his children's unpaid medical bills. This order stems from the trial court's decision at the June 25 hearing in which it gave Ms. Wehrenberg an opportunity to submit a written itemization of the children's unpaid medical bills. The court said that once it received this information it would render a decision. After some delay, Ms. Wehrenberg submitted this information to the court. The court reviewed it and then ordered Mr. Brinckman to pay the $606.37 owed to the Gunderson clinic.

In his briefs, Mr. Brinckman raises several reasons why the trial court erred in this matter. First, Mr. Brinckman contends that the trial court erred in ordering him to pay these medical expenses when all the evidence presented at the June 25 hearing demonstrated that he had paid his share of these expenses. Second, he asserts that the trial court erred in allowing Ms. Wehrenberg an opportunity to submit evidence after the hearing and off the record. Third, he argues that the trial court erroneously exercised its discretion when it did not rule on the several written objections that he submitted via the mail. Fourth, he contends that the trial court erroneously exercised its discretion when it made rulings without holding another in-court hearing. Fifth, he argues that the trial court erred in considering Ms. Wehrenberg's letter and bill summary, which he

believes is inadmissible hearsay. Sixth, he asserts that the trial court erred when it interpreted the divorce judgment, which stated that each party was to pay one-half of the children's medical expenses not covered by insurance, and to require him to pay one-half of the "litigation expenses" incurred by Ms. Wehrenberg for the preparation of her expert psychologists. Finally, he argues that the trial court erred in requiring him to pay these expenses when both parties had the right to challenge the failure of the insurer to pay expenses covered under the plan, or to challenge a health care provider who charges more than it agreed to charge, and that the mere existence of an unpaid bill from a health care provider is not in and of itself proof that a divorced parent owes anything, particularly when a divorced party disputes liability for such a bill.

We conclude that Mr. Brinckman waived his right to appeal the procedural and evidentiary issues listed above by failing to object at the June 25 hearing when the trial court set out the process that it was going to employ. An objection not made to the trial court is waived. *See* ***Christenson v. Equity Coop. Livestock Sale Ass'n.***, 134 Wis.2d 300, 306, 396 N.W.2d 762, 765 (Ct. App. 1986). A contemporaneous objection gives the trial court the opportunity to correct its own errors and thereby avoid unnecessary delays through appeals, reversals, and new trials. *See* ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 686 (Ct. App. 1985). Since Mr. Brinckman failed to make a contemporaneous objection when the trial court made its ruling as to the process it would use, the objection is now waived. *See* ***McGarrity v. Welch Plumbing Co***., 104 Wis.2d 414, 417 n.2, 312 N.W.2d 37, 39 n.2 (1981).

However, we will reach the issue of whether the trial court erroneously exercised its discretion in holding Mr. Brinckman liable for the unpaid medical bill. We review a trial court's discretionary determinations under an

erroneous exercise of discretion standard. *See* ***Hartung***, 102 Wis.2d at 66, 306 N.W.2d at 20. A trial court exercises appropriate discretion when it examines the relevant facts, applies a proper standard of law, uses a demonstrative rational process, and reaches a conclusion that a reasonable judge could reach. *See* ***State v. Sullivan***, 216 Wis.2d 768, 780, 576 N.W.2d 30, 36 (1998).

On May 16, 1997, after reviewing the various medical bills, the trial court sent Mr. Brinckman and Ms. Wehrenberg each the following letter, which set out its reasons for holding Mr. Brinckman liable for the Gunderson Clinic bill.

> Dr. Ms. Wehrenberg and Mr. Brinckman:
>
> In attempting to sort through various claims regarding what medical bills were paid by what party and what medical bills remain unpaid and what party was responsible for payment of that particular medical bill, I have come to the conclusion that the Gunderson Clinic bill is the responsibility of Mr. Brinckman. Whether that bill is itself reasonable and necessary is subject to dispute. Mr. Brinckman should take steps either to contest the bill or to pay it. If Mr. Brinckman's representation to the court at the time this case was heard last year is correct, then he should be able to establish that the bill is unreasonable and uncollectable and negotiate a settlement with the Gunderson Clinic regarding this bill.
>
> While the court finds that Mr. Brinckman is responsible for this bill, the court does not find that Mr. Brinckman is in contempt of the court order. Mr. Brinckman's failure to pay this bill was based on his reasonable belief that the charges of the Gunderson Clinic were not necessary and unreasonable since the insurance company refused to pay those charges on the same basis. If Mr. Brinckman is correct on his contention, then there will be no money due and owing the Gunderson Clinic or the Gunderson will be ultimately unable to collect their bill.
>
> This letter now resolves all the issues presented to the court for its decision.
>
> Sincerely yours,
>
> Robert W. Wing
>
> Circuit Court Judge

We are satisfied that the trial court adequately explained the reasoning for its decision, and we conclude that the court's rationale was reasonable. If Mr. Brinckman thought the bill was unreasonable or unnecessary, he could contest it. Were he unsuccessful in showing that the bill was unreasonable or unnecessary, he offers no explanation for why his insurer would not be liable for the bill. Were he successful, he does not contest that he would not have to pay the bill. The trial court believed that this was a fair way of handling the matter, and Mr. Brinckman has pointed to no evidence in the record that suggests that it is not. We therefore reject Mr. Brinckman's assertion that this was an erroneous exercise of discretion.

B. Placement privileges

Mr. Brinckman also argues that his move to Prairie du Chien made it feasible for him to see his children more, and that the trial court erred in denying his motion to re-establish weekday placement privileges. However, Mr. Brinckman fails to recognize that the trial court did not eliminate the weekday visitations because Mr. Brinckman was living in Onalaska. Rather, it eliminated weekday placement on the recommendation of Dr. Bliss, who determined that the high level of conflict that existed between Mr. Brinckman and Ms. Wehrenberg was having a negative impact on the children, and this conflict increased the more the children visited with Mr. Brinckman. In her written report, which was submitted prior to the September 18, 1995 motion hearing, Dr. Bliss stated:

> Each child appeared to be very troubled by the conflicts they have experienced. They dread the fighting between the parents and the jibes and comments they hear from each demeaning the other. *Conflict is the greatest predictor of maladjustment in children of divorce.* These children have experienced parental conflict over most of their lives and already show signs of significant stress reactions and impairments in their relationships with their

> father. Containment of this conflict is the core issue that should be considered as the court adjusts the placement schedule.
>
> ….
>
> The most significant problem with the current schedule involves the number of transitions that must be accomplished from one parent to the other and conflicts that are often probable and always possible during the exchanges.

(Emphasis added for the parties' benefit.)

At the September 18, 1995 hearing, Dr. Bliss testified regarding her report. She stated the following:

> You know these schedules where kids are going back and forth multiple times frequently are for the low conflict situations. This is not a low conflict situation. If nobody goes to see any therapist the best thing the court can do is to decrease the number of transitions these kids are making in this war zone.

At the June 25, 1996 hearing, when Mr. Brinckman moved the court to re-establish the Tuesday and Thursday placement, the trial court noted that the conflict between the parties in this case had not subsided. The trial court stated:

> The only thing I can see so far, you people still don't get along, and neither one of you are going to let go. That's the only thing I can see right now that has been proven conclusively.
>
> ….
>
> I will be honest with you. Mr. Brinckman has presented his case, and he hasn't presented a case in my opinion just because of the way this has gone, his continual answers on his own case, his inability to not throw in a barb almost with every answer he makes shows me that Dr. Bliss' conclusion at the time of the last hearing, and my conclusion at that time, and this time, says that there should be no change in how the child placement order is currently written.
>
> ….

> … I am going to deny Mr. Brinckman's motion to modify physical placement. In my opinion it is eminently clear the parties, both parties, it is like gasoline and fire, I don't know who is responsible for the explosions, but there are explosions every time these two people come into contact with one another. And the less the children are exposed to those contacts the better. So I think there is just no purpose in allowing these children more contacts, more exchanges, and that would just simply be detrimental to their best interests in my opinion.

Section 767.325, STATS., which addresses modifying physical placement, requires that the trial court determine what is in the best interests of the child. The trial court in this case decided that the best interests of the children would be served by maintaining the existing visitation schedule.[2] We conclude that this was not an erroneous discretionary determination.

C. Guardian ad litem

Mr. Brinckman also argues that the trial court erred when it deferred to the guardian ad litem regarding matters of placement. He contends that under ***Biel v. Biel***, 114 Wis.2d 191, 194, 336 N.W.2d 404, 406 (Ct. App. 1983), the trial court cannot delegate the power to make custody and visitation determinations to any person, and the trial court in this case erred when it delegated such power to the guardian ad litem. We agree that the trial court is not permitted to delegate final authority in making these determinations to a third party; however, the trial

[2] The following is the portion of the hearing transcript in which the trial court discussed how Mr. Brinckman could get his weekday placement re-established:

> **Mr. Brinckman**: One other thing, Your Honor. I know these are hard proceedings, but is there a point at which I can get back the Tuesdays and Thursdays?
>
> **The Court**: The only possibility I can see, Mr. Brinckman is, one, is that you are going to have to take, Dr. Bliss has recommended anger management, … I think you have to definitely take that at the very least.

court in this case did not give the guardian ad litem final authority to make these determinations. The court said:

> **The Court**: The guardian ad litem can negotiate. He has been given the authority to do that…. There is no such thing as binding arbitration in family matters. I can't do that. The law does not permit it. But he can help negotiate.
>
> ….
>
> **Mr. Wright**: Your Honor, if I may get a point of clarification on my authority here, it is to negotiate, but not to arbitrate.
>
> **The Court**: Well, there is nonbinding arbitration.
>
> **Mr. Wright**: Nonbinding. So I can declare how they should do it, and I can't force them.
>
> **The Court**: That's what the law says.

In light of the trial court's accurate statement of the law, we reject Mr. Brinckman's assertion that the trial court erroneously delegated "final" authority to determine matters of placement. The court merely gave the guardian ad litem the power to negotiate and engage in nonbinding arbitration.

We make the following observation: The single factor coursing strongly through this record is Mr. Brinckman and Ms. Wehrenberg's anger toward one another. Both use their children as weapons to attack the other. It seems to matter not at all to either Mr. Brinckman or Ms. Wehrenberg that this will inevitably damage their children. We sincerely hope both parents will change their behavior.

CONCLUSION

We are satisfied that though the trial court erred when it did not allow Ms. Wehrenberg to testify under oath at the June 25 hearing, that error was harmless. And even if the trial court erred by not requiring the production of certain financial documents that Ms. Wehrenberg subpoenaed, that error is

harmless. We are equally satisfied that the trial court did not erroneously exercise its discretion when it ordered Mr. Brinckman to pay the Gunderson Clinic bill, declined to re-establish Mr. Brinckman's weekday placement privileges, and authorized the guardian ad litem to negotiate any disputes concerning placement of the children.

By the Court.—Orders affirmed

Not recommended for publication in the official reports.