

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2491

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

KERRY J. KOWAL,

PETITIONER-RESPONDENT,

V.

GREGORY W. KOWAL,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
MICHAEL J. BYRON, Judge. *Affirmed in part; reversed in part and cause
remanded.*

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

PER CURIAM. Gregory Kowal appeals from the judgment divorcing him from Kerry Kowal. The trial court awarded Kerry the sole legal custody and primary physical placement of the parties' two children. The court

also found Gregory in contempt for violating the discovery deadline in the scheduling order. We affirm the custody ruling and reverse the contempt order.

The parties married in 1990, and their children were born in 1991 and 1994. Kerry's two daughters from a previous marriage also lived in the household. In May 1997, the trial court entered a scheduling order providing a discovery deadline of September 1, 1997, and a trial date in October 1997. The court also authorized the guardian ad litem to appoint a custody evaluator. He selected Dr. Beverly Bliss, a psychologist.

Dr. Bliss did not receive all of the information necessary to complete her report until September 15, and did not submit her report until September 16, 1997. The trial was subsequently postponed until February 1998, for unrelated reasons.

In December 1998, Gregory moved to extend the discovery deadline, so that he could depose Dr. Bliss. The trial court denied the motion as untimely, reasoning that Gregory should have acted before the September 1 deadline lapsed.

At trial, Dr. Bliss testified that Kerry should receive primary physical placement of the children because she had spent the most time with them and was their primary psychological parent. The two experts who appeared on Gregory's behalf testified that he should receive primary physical placement because he was more stable and had fewer psychological problems than Kerry. During the trial, Gregory went to his step-daughters' schools and, by misrepresenting his current relationship with Kerry, obtained information about them to help his case. Kerry learned of Gregory's visits, and moved to hold him in contempt for conducting "formal discovery" after the cutoff date. The court found

Gregory in contempt for violating the discovery order, refused to let him use the evidence he found, and imposed costs.

At the conclusion of the trial, the court accorded Dr. Bliss's testimony and opinion the most weight, because she was the only one of the three testifying experts that interviewed all of the relevant persons in the dispute. Additionally, the court found that the children would benefit by remaining in the same household as their step-sisters who, in the court's view, were an integral part of their family. The court weighted those factors as more important than the benefits Gregory might provide the children later in life.¹ The court further concluded that joint legal custody was not feasible because the parties did not agree to it and could not presently cooperate with each other. The latter determination is not challenged on appeal.

In other matters, the trial court divided the property evenly, despite the fact that Gregory brought far more assets into the marriage than Kerry did. Gregory contends that the trial court erroneously exercised its discretion by: (1) awarding sole legal custody and primary physical placement to Kerry; (2) refusing to extend the discovery deadline; (3) equally dividing the marital property; and (4) finding Gregory in contempt. He also contends that because the real controversy was not fully and fairly tried, we should reverse under § 752.32, STATS.

Awarding custody is a discretionary determination that we will not reverse unless the court exceeds its discretion or applies an erroneous rule of law.

¹ The court stated that while Gregory might "be better at planning to get them to college and respectability in marriage and all of that, the court believes that at this period of time their needs are not to further disrupt their nuclear family"

See Bohms v. Bohms, 144 Wis.2d 490, 496, 424 N.W.2d 408, 410 (1988). The exercise of discretion requires the court to consider the facts of record in light of the applicable law and reach a reasoned and reasonable decision. *See id.* The trial court's primary concern in awarding custody is the children's best interest. *See* § 767.24(5), STATS.; *Johnson v. Johnson*, 78 Wis.2d 137, 148, 254 N.W.2d 198, 204 (1977). The court must consider reports of appropriate professionals and must consider factors that include the interaction and interrelationship of the children with their parents and siblings, the children's adjustment to home, school, religion and community, and the mental and physical health of the parties. *See* § 767.24(5), STATS.

The trial court properly exercised its discretion when it awarded custody to Kerry. Gregory takes issue with Dr. Bliss's opinion, as well as the trial court's reliance on it. However, the court's decision indicates that it fully and fairly considered the opinions of all of the experts, and articulated a reasonable basis for according the most weight and credibility to Dr. Bliss's testimony. That determination as to weight and credibility is not subject to review. *See Rubi v. Paige*, 139 Wis.2d 300, 308, 407 N.W.2d 323, 326 (Ct. App. 1987). Additionally, the court relied on the proper factors and articulated why those factors, on balance, favored placing the children with Kerry.

The trial court properly denied Gregory an extended discovery deadline. Amending the scheduling order is a matter for the trial court's discretion. *See Alexander v. Riegert*, 141 Wis.2d 294, 298, 414 N.W.2d 636, 638 (1987). We conclude that the trial court reasonably denied Gregory's request for a belated deposition of Dr. Bliss. She was appointed several months before the September 1 deadline, and Gregory could and should have deposed her before that date, with the trial then scheduled for October. He did not offer, nor could he

offer, a plausible reason for his failure to timely act. Additionally, even if the trial court wrongfully denied the extension request, Gregory has not demonstrated how that decision prejudiced him. Using her report, he was able to effectively cross-examine Dr. Bliss, and to introduce testimony from other experts disputing her conclusions.

We need not determine whether the trial court properly divided the marital property. Gregory superficially raises and discusses the issue in a two paragraph section of his brief. We may decline to review inadequately briefed issues. *See State v. Pettit*, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

The trial court erred by holding Gregory in contempt of court. The trial court had previously barred “formal discovery.” The motion for contempt alleged that Gregory’s visits to his step-daughters’ schools were “formal discovery” efforts. Section 804.01(1), STATS., describes discovery methods to include depositions, interrogatories, production of documents, permission to inspect land or other property, physical and mental exams, and requests for admissions. Using the modifier “formal” does not, in any reasonable view, expand upon these statutorily defined discovery methods. Gregory’s visits to the schools, while perhaps improper, did not constitute discovery, and cannot be the basis for a contempt finding. We therefore reverse the contempt finding and relieve Gregory of the obligation to pay the costs and fees imposed by the trial court.

We decline to order a new trial in the interest of justice. Section 735.52, STATS., grants that discretionary authority where the real controversy has not been fully tried. Here, the matter was thoroughly, if not exhaustively, tried

with twenty-five witnesses presented over the course of eight days. Gregory, however, contends that he was unfairly disadvantaged because he could not depose Dr. Bliss, his experts never interviewed Kerry, and he could not use the information he improperly obtained from the children's school records. We have already concluded that the trial court properly barred his attempt to depose Dr. Bliss, which was a nonprejudicial ruling in any event. If Gregory believed that Kerry improperly refused to meet his expert witnesses, he could have moved to compel her cooperation, but he did not. Gregory advances no explanation as to why the trial court erred by excluding the children's school documents. Overall, we conclude that but for his own omissions, Gregory was able to fairly and fully present his evidence.

By the Court.—Judgment affirmed in part, reversed in part and cause remanded.

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

