COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 99-2148, 99-2872

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

IN RE THE MARRIAGE OF:

SHANE C. REINHART,

PETITIONER-APPELLANT,

V.

PEGGY S. REINHART,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Shane Reinhart appeals the judgment of divorce awarding his former wife Peggy Reinhart primary physical placement of their

three children. He argues that the trial court erred by refusing to allow the children to testify. We reject his argument and affirm the judgment.

BACKGROUND

¶2 Shane and Peggy were married in 1988 and divorced in 1999. They had three minor children: Melinda, Miranda and James, who at the time of the divorce were respectively ages nine, eight and six. By stipulation of the parties, the children lived with Shane during the pre-divorce separation. Shane's parents assumed a primary caretaker function during much of this period. The parties stipulated to most economic issues but contested only child custody and placement.

¶3 The trial took place over three days in February 1999. Various witnesses testified that the children wished to remain in Shane's custody. No one, including Peggy, contested this point. Several witnesses suggested, however, that Shane and his parents had improperly influenced the children and sabotaged their relationship with Peggy. The trial court found this testimony credible and decided not to place significant emphasis on the children's expressed preference.

¶4 The court made the following written findings of fact, among others: At times, both Shane and Peggy abdicated their parental responsibilities to Shane's parents. Shane's parents assumed a parental role for the children and interfered with the children's relationship with Peggy. The grandparents downgraded Peggy and verbally abused her in front of the children, "say[ing] things to the children concerning [Peggy] that were intended to undermine, demoralize and discredit [her] in the eyes of the children." There was a practice of removing the children from school early and feeding them before they went to Peggy's home so they would not be hungry when Peggy put supper on the table. Shane not only failed to

stop this from occurring, but contributed to the problem. For example, he disparaged Peggy on the phone in front of the children. When Peggy left the home after Shane threatened her by holding a gun to her head, Shane lied to the children about the incident and told them that their mother had left them. He did not admit his lie for two years and then did so only after a home study report was highly critical of him. The court indicated that "[Shane thereby] sow[ed] these seeds to alienate the children from their mother and … he succeeded. … The children's expression of a preference to live with their father was a direct result of this."

¶5 The trial court concluded that "Shane has unreasonably interfered with the children's relationship with their mother and it is likely that such interference will continue. … In order to insure that the minor children have a continuing loving relationship with both parents, it is necessary to award primary physical placement of the minor children to Peggy." The court explained that Peggy alone was in a position to nurture both parental relationships with the children. Therefore, placement with her was in the best interests of the children.

ANALYSIS

¶6 Shane challenges the trial court's conclusion by arguing that he was not given the opportunity to present the testimony of the children, who he claims were the best witnesses to the alleged sabotage of their mother's relationship. He points to statements made by the children that indicated that it was Peggy who spoke poorly about Shane, not vice versa. Citing WIS. STAT. § 906.01 (1997-98),[1]

[1] WISCONSIN STAT. § 906.01 (1997-98) provides: "**General rule of competency.** Every person is competent to be a witness except as provided by ss. 885.16 and 885.17 or as otherwise provided in these rules." All further statutory references are to the 1997-98 edition.

Shane contends that at least his eldest child was competent to testify and that he has a right to present competent witnesses.

¶7 We rejected this identical argument, however, in ***Hughes v. Hughes***, 223 Wis. 2d 111, 133, 588 N.W.2d 346 (Ct. App. 1998).

> The general rule on competency of witnesses permits [the child] to testify as an evidentiary matter; it does not remove or negate the trial court's discretion in the particular circumstances of a custody or placement dispute to decide that it is not in the child's best interest to testify to the child's preference on placement or custody.

¶8 Therefore, the decision whether to permit a competent child's testimony in a child placement or custody dispute is left to the trial court's discretion. *See* ***id.*** A court properly exercises its discretion when it examines the relevant facts, applies the proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. *See* ***Baird Contracting, Inc. v. Mid Wisconsin Bank***, 189 Wis. 2d 321, 324, 525 N.W.2d 276 (Ct. App. 1994).

¶9 One of the factors a trial court "shall" consider in deciding what is in a child's best interests with respect to placement and custody is "[t]he wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional." WIS. STAT. § 767.24(5)(b). We interpret this statute as allowing the court to choose the means that is most appropriate for informing itself of the child's preference. *See* ***Hughes***, 223 Wis. 2d at 131.

¶10 Here, the guardian ad litem communicated the children's preference to the trial court, but also indicated a strong opposition to having them testify. The

guardian raised concerns that the children would suffer significant and needless trauma in the long term if they were forced to further pick sides in open court. In addition to the trial testimony, the court also had a home study report that indicated Shane and his parents were exerting pressure on the children to choose primary placement with Shane. The court relied on the testimony, reports and recommendations in concluding that it would not be in the children's best interests to testify.

¶11 The trial court properly exercised its discretion. Initially, we note that any further testimony by the children that they preferred to live with their father would merely have been cumulative. As in ***Hughes***, the trial court was well informed of the children's preferences. There was no dispute as to who the children preferred to live with. The court discussed the children's preference to live with Shane extensively when it admonished Shane against further interfering with the children's relationship with their mother.

¶12 Shane's argument that he did not sabotage the children's relationship with their mother and that the children could have exonerated him is not persuasive. First, given the children's ages, they could not have been aware of each time Shane and his parents subtly damaged their relationship with their mother. Second, it was reasonable for the trial court to conclude that it would be unrealistic and harmful to have the children face adversarial examination regarding their father and grandparents' acts of sabotage. Third, Shane admitted that he sabotaged the children's relationship with their mother in part by admitting to an incident where he drove Peggy from the home by pointing a gun at her head. He also admitted that he lied to the children about that incident during the separation and told the children that their mother had simply left them.

¶13 Shane also complains that the trial court's preference for not allowing children to testify means that it failed to exercise its discretion. He points to the court's statement, that "I think I can unequivocally state that in the last dozen or so years, I have been adamant that I don't believe the children should [testify]. … And I've done that since 1989." We disagree. First, while the court did acknowledge its preference, it also specifically found, based on the evidence before it, that requiring the children to testify would not be in their best interests. Second, the court's preference merely reflected its understanding of the psychological hazards children may face if they are forced to choose sides in open court. Trial judges are not required to render decisions divorced from their common understanding and experience. Exerting harmful pressure on the children and the possible costs of having the children testify were sufficient factors to outweigh the benefit of having child testimony in ***Hughes***, 223 Wis. 2d at 131-32. They are sufficient factors to support the trial court's discretionary decision here as well.[2]

[2] Shane also contends that without the children's testimony he was unable to present all his evidence and this violated his constitutional rights to a fundamentally fair hearing. However, he fails to cite any authority for the proposition that he has a constitutional right to present the testimony of his children in a placement dispute, which appears contrary to the rule that allows a trial court to use its discretion to exclude that testimony. He also fails to adequately develop the (continued)

By the Court.—Judgment affirmed.

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

argument. Instead he cites several cases that are not themselves apparently germane to the issue and he provides no analysis that would suggest a logical extension in this context. The trial court considered the children's preferences. We need not address Shane's inadequately developed and amorphous argument further. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995). Shane's insinuation that the court's decision violated the children's constitutional rights fails for the same reasons, as well as the fact that he has no standing to raise that issue. *See* ***Rakas v. Illinois***, 439 U.S. 128, 138-49 (1978).