COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3094

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT 1

IN RE THE PATERNITY OF
ERIN RAE L., D.O.B. 2/11/98:

JON F.T.,

PETITIONER-APPELLANT,

V.

KAREN L.,

RESPONDENT-RESPONDENT.

APPEAL from order of the circuit court for Milwaukee County: LOUISE M. TESMER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, J.J.

¶1 PER CURIAM. Jon T. appeals from the trial court's order, following a bench trial, denying him equal physical placement of his daughter,

Erin, with her mother, Karen L. Jon T. claims that the trial court erroneously exercised its discretion by: (1) not ordering equal physical placement based, in part, on the court's belief that WIS. STAT. § 767.51(3) included a presumption favoring physical placement with the child's mother, thus violating his right to equal protection; and (2) not ordering a long-range physical placement plan which eventually included equal placement of the child.[1] Karen L. requests that attorney fees and costs be assessed against Jon T. We affirm and deny the request for fees and costs.

I. BACKGROUND

¶2 The parents in this case disagreed on the issue of the physical placement of their one-year-old daughter: the father wanted equal placement while the mother wanted primary physical placement. A bench trial was held and the parties each presented an expert. These expert witnesses, however, disagreed on whether equal placement would be in the best interests of the child. Dr. Marc J. Ackerman, the mother's expert, opined that it was psychologically unhealthy for a one-year-old child for parents to have fifty-fifty placement because "bouncing a child back and forth at this early age" interferes with a child's development of a sense of security and stability.

¶3 In rendering its decision, the trial court started out by noting: "There is, I believe, what might be called a presumption of sole custody in the mother, and I believe that implicit in that is presumption of primary physical placement." The trial court, however, went on to apply WIS. STAT. § 767.24(5) to the facts and

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

concluded that equal placement was not in the best interest of the child. In addition, the trial court did not order an eventual transition to equal placement. Instead, the trial court informed the parties that it was reluctant to make placement orders "far into the future" and that it preferred to "wait and find out" how the child was doing at ages three or four.

II. DISCUSSION

¶4 The trial court has "wide discretion in making physical placement decisions. *See* ***In re the Marriage of Wiederholt***, 169 Wis. 2d 524, 530, 485 N.W.2d 442, 444 (Ct. App. 1992). What is in the best interest of a child presents a mixed question of law and fact, with the trial court's determination on psychological factors being a question of fact. *See* ***Wiederholt***, 169 Wis. 2d at 530–531, 485 N.W.2d at 444. We will not set aside a trial court's findings of fact unless clearly erroneous. *See* WIS. STAT. § 805.17(2). Whether the trial court properly exercised its discretion, however, is a question of law. *See* ***Seep v. Personnel Comm'n***, 140 Wis. 2d 32, 38, 409 N.W.2d 142, 144 (Ct. App. 1987). "An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225, 229 (1995).

¶5 Jon T. first argues that the trial court failed to apply a proper standard of law by misapplying a presumption that favored the placement of his daughter with her mother. WISCONSIN STAT. § 767.51(3) provides, as material here:

> **Paternity judgment.** A judgment or order determining paternity may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the legal custody and guardianship of the child, periods of physical placement, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. *Unless the court orders otherwise, if there is no presumption of paternity under s. 891.41(1), the mother shall have sole legal custody of the child.*

(Emphasis added.)[2] After quoting § 767.51(3), the trial court concluded: "I guess I read the sole custody as providing that the mother shall have the physical and legal custody of the child."[3] After making this statement, however, the trial court ruled: "Nonetheless, I'm going to take the … legal standard that's set forth in 767.24(5) and apply them [*sic*] to the case here." Section 767.24(5) sets forth the appropriate

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[2] WISCONSIN STAT. § 891.41 provides, in pertinent part:

> **Presumption of paternity based on marriage of the parties.** **(1)** A man is presumed to be the natural father of a child if any of the following applies:
>
> (a) He and the child's natural mother are or have been married to each other and the child is conceived or born after marriage and before the granting of a decree of legal separation, annulment or divorce between the parties.
> (b) He and the child's natural mother were married to each other after the child was born but he and the child's natural mother had a relationship with one another during the period of time within which the child was conceived and no other man has been adjudicated to be the father or presumed to be the father of the child under par. (a).

Jon T. and Karen L., however, were never married. Thus, Jon T. was not presumed to be the child's father under this statute.

[3] The record reflects that Jon T.'s lawyer acquiesced to the trial court's reading of WIS. STAT. § 767.51(3) by responding: "As you said, judge, it says unless other orders are made and that's said before the – actual presumption's not mentioned in the statute. It's not a presumption but it's a shall. It's a mandate, shall." Although we do not ordinarily consider issues raised for the first time on appeal, *see* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140, 145 (1980) (superceded by WIS. STAT. § 895.52 on other grounds), we nevertheless address Jon T.'s claim.

factors to consider when making a physical placement determination and expressly provides that "[t]he court may not prefer one potential custodian over the other on the basis of the sex … of the custodian."[4]

¶6 While the father agrees in his brief and appeal that WIS. STAT. § 767.24 governs a "physical placement determination in a paternity case," he argues that the trial court merely "purported" to apply this standard and erred by not ordering equal placement. We disagree. Contrary to the father's argument,

[4] WISCONSIN STAT. § 767.24(5) provides:

> **Custody and physical placement. (5)** FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS. In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interests of the child. The court may not prefer one potential custodian over the other on the basis of the sex or race of the custodian. The court shall consider reports of appropriate professionals if admitted into evidence when legal custody or physical placement is contested. The court shall consider the following factors in making its determination:
> (a) The wishes of the child's parent or parents.
> (b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
> (c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
> (d) The child's adjustment to the home, school, religion and community.
> (e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.
> (f) The availability of public or private child care services.
> (g) Whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.
> (h) Whether there is evidence that a party engaged in abuse … of the child.
> (i) Whether there is evidence of interspousal battery … or domestic abuse.
> (j) Whether either party has or had a significant problem with alcohol or drug abuse.
> (k) Such other factors as the court may in each individual case determine to be relevant.
> (l)

the record reflects that the trial court thoroughly considered each factor listed in § 767.24(5) before making its determination that equal placement was not in the best interest of the child. While the father contends that "the trial court's belief in the presumption was at least a determinative factor in awarding Karen primary placement," the trial court, applying the correct legal standard, could arrive at the result stated in its order.[5]

¶7 Here, the trial court relied on the opinion of Dr. Ackerman, whom the trial court found to be more credible than the father's expert witness. Dr. Ackerman testified that it would be psychologically unhealthy for a one-year-old child to have parents with fifty-fifty placement because frequent changes in placement would not be beneficial to the child. Credibility determinations are left to the trial court. *See* ***State v. Owens***, 148 Wis. 2d 922, 930–931, 436 N.W.2d 869, 872–873 (1989); *see also* WIS. STAT. § 805.17(2) ("due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). The trial court acted well within the ambit of its discretion when it denied the father's

[5] The father's belief that "the presumption was at least a determinative factor in awarding Karen primary placement" is further refuted by the record:

> THE COURT: What the court is doing here is weighing and balancing the interest of the parents here against the interest of the child, and it may seem like I'm coming down on the side of one parent on overnights but I'm not. I'm coming down on what I believe to be in the best interest of the child. I believe and I find that Dr. Ackerman's testimony was more credible … and the risks that he sees are, in the court's view, such serious risks that I come down on the side of the child, and it just happens to be the same side that the mother is advocating to the court.

motion for equal placement. The trial court did not erroneously exercise its discretion.[6]

¶8 The father also claims that the trial court erroneously exercised it discretion when it failed to order a long-range physical placement plan to accommodate his daughter's interests when she became older, and that the trial court's decision in this regard was contrary to the evidence and public policy. The record, however, supports the trial court's determination. The trial court, relying on the opinion of Dr. Ackerman, determined that it was prudent to "wait and find out" how the child was doing at ages three or four, rather than ordering the eventual transition to equal placement between the parents. This determination was consistent with Dr. Ackerman's opinion that equal placement can be detrimental when a child is under six years of age. Although the father complains that the trial court should have set forth a physical placement plan for when the child reached ages four, five, etc., he may seek a placement modification at a later date. Indeed, the trial court indicated this possibility when it stated that the placement schedule would continue "until the parties come into court to address it at some later point in time." Accordingly, the trial court did not erroneously exercise its discretion.

B. Attorney Fees and Costs

¶9 Finally, we consider Karen L.'s claim that she should be awarded frivolous attorney fees and costs pursuant to WIS. STAT. § 809.25(3)(a), or in the

[6] Because we have concluded that the trial court correctly applied WIS. STAT. § 767.24(5), and therefore, did not erroneously exercise its discretion, we need not address the ancillary constitutional arguments regarding equal protection. *See* ***Grogan v. Public Serv. Comm'n***, 109 Wis. 2d 75, 77, 325 N.W.2d 82, 83 (Ct. App. 1982) ("We do not decide constitutional issues if the resolution of other issues can dispose of an appeal.")

alternative, fees and costs under § 809.25(1)(a)5.[7] Karen L.'s claim is based on what she considers to be Jon T.'s repeated misstatements of the record, his lack of appropriate citation, and his citation to unpublished cases. Karen L. claims that, as a result of these actions, her attorney had to double check information at an increased cost to herself. To find an appeal frivolous, we must find that the appeal was filed in bad faith or to harass, or without any reasonable basis in law or equity. *See* ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 841, 520 N.W.2d 93, 98 (Ct. App. 1994). We conclude that Jon T.'s appeal, while not successful, was nonetheless founded on a reasonable basis in law. Therefore, we deny Karen L.'s request for frivolous appeal fees and costs. Moreover, we conclude that the record does not support Karen L.'s claims of misrepresentations and inappropriate citations. Therefore, we deny her request for fees and costs under § 809.25(1)(a)5.

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[7] WISCONSIN STAT. § 809.25(3)(a) provides, in pertinent part:

> FRIVOLOUS APPEALS. (a) If an appeal … is found to be frivolous by the court, the court shall award to the successful party costs, fees and reasonable attorney fees under this section.
> …
>
> (c) In order to find an appeal … to be frivolous under par. (a), the court must find one or more of the following:
> 1. The appeal … was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
> 2. The party or the party's attorney knew, or should have known, that the appeal … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

WISCONSIN STAT. § 809.25(1)(a)5 provides, in pertinent part:

> **Rule (Costs and fees). (1)** COSTS. (a) Costs in a civil appeal are allowed as follows unless otherwise ordered by the court:
> …
>
> 5. In all other cases as allowed by the court.

By the Court.—Order affirmed.

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