**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

May 31, 2000

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-3182-FT**

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

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**IN RE THE MARRIAGE OF:**

**MARGARET ANDERSON, N/K/A KINGSLEY,**

**PETITIONER-APPELLANT,**

**V.**

**DAVID ANDERSON,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Florence County: ROBERT A. KENNEDY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Margaret Kingsley appeals an order modifying her divorce decree to provide that physical placement of the parties' son should be

transferred to her former husband, David Anderson.[1] Margaret contends that the trial court made inadequate factual findings and failed to apply proper legal standards. She further contends that the trial judge was biased. Because the record fails to support her claims of error, we affirm the order.

¶2 The 1993 divorce judgment awarded the parties joint legal custody of their two children. The children lived with their mother in Green Bay during the school year and with their father in Florence during summer vacations. During the time they lived with their mother, the children spent holidays and vacations with their father. Also, each parent had weekend visits with the children during the time they were living with the other parent.

¶3 In April 1998, because her new husband obtained employment in the Chicago area, Margaret moved to modify the divorce judgment. David objected. Before the hearing, the parties reached an informal agreement that permitted Margaret to move to Illinois with both children. David would see the children two times a month during the school year instead of three times per month as provided in the divorce decree.

¶4 In January 1999, Margaret filed a new motion requesting to move with the children to Indianapolis because of her husband's work-related transfer. David objected and sought to modify the divorce judgment by seeking primary physical placement. Before the hearing, the parties agreed that their daughter could accompany Margaret to her new home in Indiana. The only remaining

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

dispute concerned primary placement of their son, who was thirteen years old at the time of the hearing.

¶5 David testified that due to the distances involved, he would not be able to see his children more than once a month. David testified that he lives in a newer ranch home in a country setting within two miles of his parents. He testified that he and his son share many interests, and that his son has maintained relationships with friends who live nearby.

¶6 After the testimony concluded, the court determined that Margaret's decision to move was prompted by her new husband's employment opportunity. Nonetheless, it concluded that it created a "terrible terrible burden so far as visitation is concerned, the distance, the driving, the airfare, the cost …."

¶7 The court observed that the guardian ad litem filed a thorough and detailed report that

> paint[ed] a very good, strong relationship, wholesome relationship, between the father and the son. [T]he son gets an opportunity to go to hunting, fishing, things of that nature. He is very strongly bonded to the father and [the guardian ad litem] doesn't have anything bad to say about the father at all. …
>
> [M]uch of her report is positive in terms of the son being placed with the father.

¶8 The court also found that the son expressed his strong preference to live with his father. The court ruled that it was in the son's best interest to be placed with his father and, accordingly, transferred primary placement to David.

¶9 Whether to modify a custody or placement order is addressed to trial court discretion. *See* ***Hughes v. Hughes***, 223 Wis. 2d 111, 119, 588 N.W.2d 346

(Ct. App. 1998). Discretionary decisions are sustained if the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson,*** 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). We apply the "clearly erroneous" standard to review the underlying factual component of the court's decision. *See* ***Hughes***, 223 Wis. 2d at 120. We review questions of law de novo. *See* ***id.*** Our task on review is to determine whether the record discloses a reasonable basis to support the trial court's decision. *See* ***id.***

¶10 Margaret argues that the trial court made inadequate findings of fact and failed to apply proper legal standards. We conclude that despite any alleged inadequacies in the trial court's findings of fact, the record supports its decision. Because it applied the correct legal standards and the record discloses a reasonable basis for its determination, we reject Margaret's argument.

¶11 Because he did not assert any basis for his motion other than Margaret's proposed move, David agrees that the controlling standards are found in WIS. STAT. § 767.327 (1997-98).[2] Under this statutory scheme, "the question is

[2] WISCONSIN STAT. § 767.327, "Moving the child's residence within or outside the state," reads in part:

> (3) STANDARDS FOR MODIFICATION OR PROHIBITION IF MOVE OR REMOVAL CONTESTED. (a) 1. Except as provided under par. (b), if the parent proposing the move or removal has sole legal or joint legal custody of the child and the child resides with that parent for the greater period of time, the parent objecting to the move or removal may file a petition, motion or order to show cause for modification of the legal custody or physical placement order affecting the child. The court may modify the legal custody or physical placement order if, after considering the factors under sub. (5), the court finds all of the following:
>
> a. The modification is in the best interest of the child.
>
> b. The move or removal will result in a substantial change of circumstances since the entry of the last order affecting legal

(continued)

not the right of the custodial parent to move, but rather whether physical placement should be transferred to the objecting, non-custodial parent." ***Kerkvliet v. Kerkvliet***, 166 Wis. 2d 930, 938, 480 N.W.2d 823 (Ct. App. 1992). Section 767.327(3) "sets out the *standards* which must be met for modification where a removal is contested: (1) the modification in custody or physical placement must be in the best interest of the child; and (2) the move will work a substantial change in circumstances." ***Id.*** at 940. Also, § 767.327(5) "sets out *factors* which the court must consider when applying the subsec. (3) standards: (1) the purpose for the proposed move; (2) the effect of the proposed move; and (3) alternative arrangements to continue the child's relationship with the non-custodial parent." ***Id***.

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custody or the last order substantially affecting physical placement.

2. With respect to subd. 1.:

a. There is a rebuttable presumption that continuing the current allocation of decision making under a legal custody order or continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child. This presumption may be overcome by a showing that the move or removal is unreasonable and not in the best interest of the child.

b. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under that subdivision.

3. Under this paragraph, the burden of proof is on the parent objecting to the move or removal.

….

(5) FACTORS IN COURT'S DETERMINATION. In making its determination under sub. (3), the court shall consider all of the following factors:

(a) Whether the purpose of the proposed action is reasonable.

(b) The nature and extent of the child's relationship with the other parent and the disruption to that relationship which the proposed action may cause.

(c) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent.

¶12 The record reflects that the trial court considered the appropriate factors and applied them to the applicable statutory standards. The court considered that the purpose of the proposed move was to permit Margaret's husband to take advantage of improved employment opportunities. The court also considered that the effect of the proposed move would impose a "terrible burden" on the parties' placement schedule. The court concluded that the distance, travel and costs involved precluded a convenient alternative arrangement to foster the son's relationship with his father.

¶13 In addition, the court took note of the strong bond between David and his son, their shared interests, and the son's strong preference to live with his father. Accordingly, the court found that a transfer of primary placement would serve the son's best interests. This finding amounts to a determination that the evidence rebutted the presumption that the current placement with Margaret and the proposed move to Indianapolis would be in the son's best interests under WIS. STAT. § 767.327(3)(a)2. Also, the trial court's finding that the move would place a "terrible burden" on the father and son's relationship amounts to a determination that the move, while reasonable from Margaret's economic standpoint, was not reasonable from the child's perspective. *See* ***id.*** Although the court did not recite the precise statutory language, we are satisfied that it considered the appropriate factors and applied the correct legal standards. The record reflects a rational basis supporting the trial court's decision.

¶14 Next, we reject Margaret's contention that the trial judge exhibited bias. Margaret complains that before the hearing, the judge met with the parties and the guardian ad litem and spoke about college football and his recollection of his own parents' divorce. The judge stated that when he was approximately the same age as the parties' son, he had to tell the judge where he wanted to live,

which was with his father, and that this is what happened. Margaret argues that these circumstances show that the judge was biased in favor of the father and employed his personal experiences instead of the legal standard in reaching his decision.

¶15 We are unpersuaded. Whether the judge was a neutral and detached magistrate is a question of constitutional fact we review de novo. *See* ***State v. McBride***, 187 Wis. 2d 407, 414, 523 N.W.2d 106 (Ct. App. 1994). The presumption against bias must be overcome with a preponderance of evidence. *See* ***id***. at 415. Both subjective and objective factors come into play. *See* ***id***. Here, the record gives no indication that the judge believed he was biased, thus ending our inquiry into the subjective test. *See* ***id***.

¶16 Under the objective test, one must demonstrate that he or she was treated unfairly and that the judge was actually biased. *See* ***id***. at 416. We conclude that the record fails to indicate that Margaret was treated unfairly. The judge's comments regarding his own parents' divorce, at best, create a potential for bias, which is insufficient to overcome the presumption of impartiality. *See* ***id***. The court expressed its concern about hearing Margaret's side of the story. The record establishes that the trial court based its decision on facts of record. We conclude that Margaret fails to provide any evidence that the judge was actually biased.

*By the Court.*—Order affirmed.

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