COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1620 **Cir. Ct. No. 2014FA173**

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

IN RE THE MARRIAGE OF:

DAVID L. RAINIERO,

PETITIONER-RESPONDENT,

V.

WENDY J. JOHANSON P/K/A WENDY J. RAINIERO,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: RICHARD A. BATES, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Wendy Johanson appeals a judgment of divorce, challenging the circuit court's order concerning the physical placement of the

minor children and her maintenance award. Wendy argues that the circuit court's order allowing her reasonable visitation on reasonable notice pending her relocation to South Carolina is improper, and that the circuit court erroneously exercised its discretion in setting maintenance. We affirm.

BACKGROUND

¶2 Prior to their divorce in 2015, David Rainiero and Wendy were married for almost fifteen years. The parties have two children, the eldest of whom was thirteen years old at the time of the divorce. David completed his medical degree prior to the marriage and his residency shortly thereafter. On the date of divorce, he was employed as a general surgeon with annual earnings of $360,000. Wendy received her nursing degree prior to the marriage and worked as a nurse until around 2002, following the birth of their first child. She resumed working as a nurse on a part-time basis from 2009 to 2013. She then stopped working due to side effects from prescribed medications. At the time of the divorce, Wendy operated a USANA nutritional supplement pyramid-type business that had not yet generated any income. It is undisputed that Wendy suffers from longstanding mental health issues.

¶3 The parties filed trial briefs outlining their respective positions with regard to custody and placement of the minor children. Both requested primary physical placement of the children. In her brief and at trial, Wendy repeatedly asserted her intent to move to South Carolina at the end of the school year. She testified that she intended to relocate with or without the children.

¶4 The circuit court determined that the children would be primarily placed in Wisconsin with David and that, upon her relocation to South Carolina, Wendy would enjoy specifically enumerated periods of placement commencing

with the last three weeks of summer prior to the start of the fall semester. In addition to the three summer weeks, the children would be placed with Wendy alternating Thanksgiving break and one-half of the Christmas break, and every spring break. For the roughly two-month interim period before Wendy's intended move to South Carolina, the circuit court ordered: "[Wendy's] placement of the minor children will be reasonable visits on reasonable notice approved by [David] with any such placement restricted to the city of Janesville."

¶5 After entering its orders on custody, placement, and property division, the circuit court held maintenance open and ordered further briefing. The parties submitted briefs detailing the facts of record in light of the statutory maintenance factors and relevant case law, and provided computer-generated exhibits evaluating the tax consequences of their proposals. By written decision, the court awarded maintenance to Wendy in the amount of $7,300 per month, determining that it would provide her "with sufficient income for her chosen lifestyle and budget while meeting the statutory and case law goals of maintenance."

DISCUSSION

I. PLACEMENT

¶6 In pertinent part, the judgment of divorce provides:

> 6.1 The Petitioner [David] is awarded physical placement of the children at all times subject only to Respondent's [Wendy's] periods of physical placement as set forth below. See also the Excerpt Decision attached hereto and incorporated herein.
>
> 6.2 Until the psychological health of the Respondent is determined and she has made a decision about where she is going to live, Respondent's placement of the minor children will be reasonable visits on

> reasonable notice approved by Petitioner with any such placement restricted to the city of Janesville—she is not to leave the city of Janesville or the state of Wisconsin with the children. The Respondent's placement upon her relocation to South Carolina is as follows:
>
> A. Alternating Thanksgiving breaks beginning this year and every odd year thereafter.
>
> B. Alternating one-half of the Christmas/Winter break with Respondent enjoying the second half this year and every odd year thereafter. Respondent shall enjoy the first half of the Christmas/Winter break in even years.
>
> C. Spring break every year.
>
> D. The last three weeks prior to the week school starts in the fall every year. The children must be returned no later than the weekend prior to the week that school starts in the fall.

¶7 Wendy argues that the circuit court erroneously exercised its discretion by failing to provide her with regularly occurring periods of physical placement in Wisconsin. To construct her argument, she separates ¶6.2 of the judgment into the following parts: (1) reasonable visits on reasonable notice approved by David, with any such placement restricted to the city of Janesville (the Wisconsin order); and (2) the schedule enumerating the holidays, winter and spring breaks, and summer weeks the children will be placed with her upon her relocation to South Carolina (the South Carolina order). Relying on the fact that she lived in Wisconsin at the time of the divorce, Wendy characterizes the South Carolina order as "prospective and contingent upon" a future occurrence and deems it unauthorized by law. She fails to discuss it further, stating it is "hypothetical only to this appeal." Having shifted focus away from the South Carolina order, Wendy declares that the Wisconsin order is the "operant final placement order" and that it is insufficiently specific to satisfy the statute concerning physical placement orders.

¶8 Child custody and placement determinations are committed to the sound discretion of the circuit court. *See* ***Gould v. Gould***, 116 Wis. 2d 493, 497, 342 N.W.2d 426 (1984). We will sustain a discretionary decision if the 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. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). We affirm the circuit court's findings of fact unless those findings are clearly erroneous, WIS. STAT. § 805.17(2) (2013-14),[1] but we independently review any questions of law, ***Clark v. Mudge***, 229 Wis. 2d 44, 50, 599 N.W.2d 67 (Ct. App. 1999).

¶9 WISCONSIN STAT. § 767.41(1)(b) authorizes a circuit court to make any provisions the court deems "just and reasonable" concerning the physical placement of minor children subject only to the limitations imposed by statute. In allocating periods of physical placement between parents, the circuit court must consider each case on the basis of the factors set forth in § 767.41(5)(am). *See* § 767.41(4)(a)2. Section 767.41(5)(am) provides that, in determining periods of physical placement, "the court shall consider all facts relevant to the best interest of the child," and lists sixteen factors to be considered in determining the child's best interest. *See* § 767.41(5)(am)1.-16.[2] The court must set a schedule allowing the child "to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Wendy does not argue that the circuit court failed to consider the appropriate factors in determining the children's physical placement.

each parent, taking into account geographic separation and accommodations for different households." WIS. STAT. § 767.41(4)(a)2.

¶10 We conclude that the circuit court properly allocated regularly occurring and meaningful periods of placement to Wendy in South Carolina based not on a future contingency, but on her unwavering and unequivocal representation that she was moving there at the end of the school year.[3] Although the court was concerned with Wendy's mental health, it chose to give her the benefit of the doubt by assuming that she would make "rational decisions because

[3] Wendy repeatedly testified that she intended to move to South Carolina at the end of the school year. On the penultimate day of trial, she testified as follows:

> Q Thank you. Now, Wendy, when you testified under questioning with [David's attorney] he asked you about your family and where your family is located. Before I get into that I'm going to ask you as [David's attorney] did, is it your intention to relocate to the State of South Carolina?
>
> A It is.
>
> Q Is it your intention to relocate there even if [the circuit court] indicates that the children are to remain here in the State of Wisconsin for the school year?
>
> A It is.
>
> Q And you understand that if [David] prevails here today and not only do the children stay here during the school year and he gets to decide when the children are with you, and your understanding he's saying maybe two to four weeks during the summer, if the court allows that to happen and makes that the order of the court, are you still moving to South Carolina?
>
> A I don't like it at all.
>
> Q But will you be moving to South Carolina?
>
> A I'm moving, yes. It's very necessary.

she's going to take care of herself, and the kids are going to be able to visit her there." The circuit court stated:

> And I will reaffirm what has been said by [the guardian ad litem] and [David's attorney], when she testified come hell or high water I'm moving to South Carolina, that changed the case completely. Because she was saying I'm not looking to have every other weekend or Thursday nights, I'm not looking to have Tuesday from 4 to 7, I'm out of here.

Accordingly, the circuit court fashioned a regularly occurring placement schedule based on its analysis of the children's best interests that would maximize the amount of time spent with each parent, taking into account geographic separation. *See* WIS. STAT. § 767.41(4)(a)2. The circuit court applied the correct legal standard to the facts of record and reached a reasonable decision. *See* ***Liddle***, 140 Wis. 2d at 136.

¶11 The circuit court then considered what to order pending Wendy's relocation and the commencement of her specific placement schedule. During the course of the hearing, Wendy chose to leave the courtroom while the guardian ad litem was making her recommendation. Wendy came back in and, during David's closing argument, she put her fingers in her ears, rolled her eyes, and chanted to herself. She then broke out laughing, left the courtroom, and could not be located. Given its concerns about Wendy's mental health issues and her bizarre conduct in the courtroom, the circuit court ordered that Wendy would have reasonable placement upon reasonable notice as approved by David, with the restriction that her placement not take place outside the city of Janesville.

¶12 Wendy asserts that this order is illogical given that the circuit court also awarded her lengthy periods of unsupervised placement in South Carolina. Insofar as Wendy is arguing that this provision was improper, we disagree. The

circuit court wanted to ensure that Wendy was able to have placement with the children pending her relocation, but observed that "at the moment [Wendy] is not dealing with things that a person should be able to deal with." The court explained that, based on its observations of Wendy throughout the trial, the court had growing concerns about her mental health and was "worried she might commit harm to herself at the moment." Given all of the information before the circuit court, the court properly restricted Wendy's placement for the immediate future.

¶13 To the extent Wendy is arguing that the circuit court should have ordered an alternative placement schedule in the event she changed her mind and decided to remain in Wisconsin, we disagree. It was reasonable for the court to rely on Wendy's assertion about her plans. And, Wendy did not request a placement order contemplating a hypothetical change of heart.[4]

II. MAINTENANCE AWARD

¶14 Wendy argues that the circuit court erroneously exercised its discretion in setting maintenance either by (1) declining to consider the statutory maintenance factors, or (2) improperly applying these factors to the facts of record. Maintenance determinations are entrusted to the discretion of the circuit court and will be upheld if the court examined the relevant factors, applied a proper standard of law, and, using a rational process, reached a conclusion that a

[4] Wendy's trial brief argued that the children should be permitted to move with her to South Carolina, and offered no alternative plan. At trial, she testified about what she envisioned in terms of a placement schedule for David in the event she received primary placement, and a placement schedule for herself if David received primary placement and the children resided "here in the State of Wisconsin during the school year." As to the latter, she confirmed that it might be best for the children to spend part of their summer vacation in Wisconsin to participate in various activities and confirmed that, with that understanding, it was "[a]bsolutely" still her intention to relocate to South Carolina.

reasonable judge could reach. ***Ladwig v. Ladwig***, 2010 WI App 78, ¶15, 325 Wis. 2d 497, 785 N.W.2d 664. "Although the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶15 Circuit courts consider statutorily listed factors in determining whether maintenance is appropriate, and, if so, how much and for how long. *See* WIS. STAT. § 767.56(1c).[5] These factors "are designed to further two distinct but

[5] The factors enumerated in WIS. STAT. § 767.56(1c) are:

> (a) The length of the marriage.
>
> (b) The age and physical and emotional health of the parties.
>
> (c) The division of property made under s. 767.61.
>
> (d) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> (f) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (g) The tax consequences to each party.
>
> (h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future,

(continued)

related objectives in the award of maintenance: to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties in each individual case (the fairness objective)." ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 33, 406 N.W.2d 736 (1987).

¶16 Wendy's first argument is that the circuit court committed reversible error by "declin[ing] to apply the facts of the record to the explicit statutory factors." In its written maintenance decision, the circuit court began by stating:

> The Court has heard and reviewed the evidence presented in this case: It has reviewed the briefs submitted by the parties. The Court agrees with both parties that this is a maintenance case and maintenance is awarded to [Wendy] retro-active to the date of the divorce.
>
> The attorneys in their briefs made their arguments and reviewed the Court's findings at the trial. I will not repeat them. Nor will I repeat the statutory factors regarding maintenance under Wis. Stat. Sec. 767.56. The parties basically agree to the facts pertaining to the statutory factors. The only real issues are (1) whether or not I should impute income [to Wendy], and (2) the amount of maintenance to be ordered.

Wendy invites us to interpret the circuit court's second paragraph as a pronouncement that it "will not apply the facts of record to the explicit statutory factors." We decline the invitation. The circuit court simply stated that it would

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> if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
>
> (i) The contribution by one party to the education, training or increased earning power of the other.
>
> (j) Such other factors as the court may in each individual case determine to be relevant.

not repeat the relevant facts and factors in light of the parties' detailed maintenance briefs, and, in fact, the remainder of the court's written decision discusses the evidence presented and the parties' arguments in light of the statutory maintenance factors.[6]

¶17 Wendy next argues that the circuit court improperly exercised its discretion by focusing on the support objective to the exclusion of the fairness objective. She asserts that the court placed too much weight on her earning capacity and failed to consider how her partial or complete absence from the workforce to care for the household and children during the marriage contributed to David's increased earnings. We disagree.

¶18 The parties agreed that the maintenance issues before the court were whether to impute income to Wendy and the amount of the maintenance. In setting maintenance, the court found that, as in most divorces, neither party would be able to live at the standard enjoyed during the marriage, but that David's income "will allow both parties and their children to live an upper middle class lifestyle."[7] The circuit court denied David's request to consider as an "other factor" under WIS. STAT. § 767.56(1c)(j) Wendy's alleged denial of her mental

[6] In her reply brief, Wendy modifies her argument, asserting that the circuit court was "[at] least required to *repeat* the evidence he heard and was relying upon to make his decision. Otherwise, the litigants and this Court are left mindreading." We need not consider arguments made for the first time in an appellant's reply brief. *See* ***State v. Lindgren***, 2004 WI App 159, ¶28, 275 Wis. 2d 851, 687 N.W.2d 60. Further, as Wendy's briefs sporadically acknowledge, we may search the record to determine if it supports a circuit court's discretionary decision. *See* ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. The circuit court's oral and written decisions, along with the record, provide a thorough explanation for the court's maintenance decision.

[7] The circuit court defined this "as the ability to enjoy the usual family life and pay the family expenses of an average person living in Rock County, Wisconsin but with the advantage that the income available will allow for the 'extras' without causing a financial crisis."

health and physical concerns and refusal to obtain treatment, as permitted by ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 586-87, 445 N.W.2d 676 (Ct. App. 1989) (when an alcoholic spouse claims the need for maintenance due to her alcoholism but refuses treatment, the circuit court may consider this refusal as a factor in determining maintenance). The circuit court also entertained but rejected David's argument that Wendy's submitted budget was too high because it anticipated that she would have primary placement of the children. Acknowledging that "there are always unanticipated expenses," the court found that Wendy's budget was not unreasonable in "light of the goal of providing both parties and the children with an upper middle class lifestyle." Additionally, the circuit court considered its order concerning property division and that Wendy would not be paying child support. The circuit court thus considered statutory factors relevant to both the support and fairness objectives in setting maintenance.

¶19 In deciding to impute a minimum income wage to Wendy, the circuit court found that she would not be able to "become self-supporting" but that she was able to work. The court explained:

> I will impute minimum wage as the income of [Wendy]. I have concerns about her recognition of her disability and the treatments she is choosing, but she has not been declared incompetent or a spendthrift. She testified that she does plan to work, possibly as a nurse, possibly in some other capacity and she hopes to make her USANA business profitable. She is not choosing to claim total disability and I will not make a finding that she is unable to work. I do not believe that she can become self-supporting.

The circuit court determined that Wendy's imputed monthly income of $1,317, along with her taxable monthly maintenance award of $7,300 per month, "will provide her with sufficient income for her chosen lifestyle and budget while meeting the statutory and case law goals of maintenance." Here again, the circuit

court's decision, including its determination that Wendy could not become self-supporting, demonstrates that the court considered the fairness objective. The record establishes that the circuit court applied the statutory maintenance factors to the facts of record and reached a reasonable conclusion. *See* ***Ladwig***, 325 Wis. 2d 497, ¶15.

¶20 Finally, although Wendy acknowledges that a reviewing court may search the record for reasons supporting a circuit court's discretionary decision, she suggests that, under ***Perrenoud v. Perrenoud***, 82 Wis. 2d 36, 48-50, 260 N.W.2d 658 (1978), a reviewing court may decline to do so where a maintenance award "appears low." We agree with David that Wendy's reliance on ***Perrenoud*** is misplaced. First, ***Perrenoud*** does not contain a maintenance analysis; rather, it addresses property division under Wisconsin's now extinct fault-divorce system. Second, ***Perrenoud*** is distinguishable on its facts. In ***Perrenoud***, the circuit court offered no reasoning at all for its property division, and the record was devoid of any explanation as to how the circuit court valued the divided property. *See* ***id.*** at 43-45, 48. The Wisconsin Supreme Court reversed and remanded for further findings after determining that, "[w]ithout the trial court's reasons for the division of the property, appellate review of the fairness of the result is impossible." ***Id.*** at 50. Thus, the lynchpin in ***Perrenoud*** was not the apparently low property award, but rather the utter lack of any record support for the circuit court's decision. Wendy offers no authority for the proposition that a maintenance award that "appears low" requires a different standard of review.

By the Court.—Judgment affirmed.

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