COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP1622 **Cir. Ct. No. 1996FA912**

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

IN RE THE MARRIAGE OF:

LORI TROST,

PETITIONER-RESPONDENT,

V.

KEITH D. TROST,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Keith D. Trost appeals pro se from an order modifying legal custody and periods of physical placement of his daughter Alice and requiring him to pay child support. We affirm the order.

¶2 A brief history of this case is set forth in ***Trost v. Trost***, 2000 WI App 222, ¶2, 239 Wis. 2d 1, 619 N.W.2d 105, and we need not repeat it here. It is sufficient to say that as a result of a stipulated divorce, Keith and his former wife, Lori, shared legal custody of Alice and primary placement was with Lori. In April 2000, the parties stipulated to a placement schedule whereby Keith had primary placement of Alice. Lori had placement alternate weekends and Wednesdays from 9:00 a.m. to 5:30 p.m. In November 2001, Keith moved to a city that was a four-hour drive from Lori's home. In January 2002, Lori moved to modify legal custody and the primary placement arrangement. On March 28, 2002, the circuit court found that Keith's move was more than 150 miles away and that Keith did not give the notice required by WIS. STAT. § 767.327(1)(a) (2003-04).[1] On a temporary basis the court ordered primary placement with Lori and placement with Keith on alternating weekends.

¶3 The matter was subsequently heard on four different dates. The circuit court found that Keith's move was a substantial change of circumstances because it prevented Lori from having her midweek placement with Alice. Despite Alice's desire to be home schooled, the court found that home schooling by Keith was not in Alice's best interest. It also found that Keith had interfered with medical appointments set up for Alice. It awarded primary placement and sole legal custody with respect to medical and education issues to Lori.

[1] All references to the Wisconsin Statutes are to the 2003-04 version.

¶4 We first address whether the circuit court properly exercised its discretion in modifying the placement arrangement.[2] *See* ***Keller v. Keller***, 2002 WI App 161, ¶6, 256 Wis. 2d 401, 647 N.W.2d 426. Where a modification substantially alters a placement schedule and more than two years have elapsed from the initial placement order, the circuit court must first find a substantial change of circumstances since entry of the last order and then find modification to be in the child's best interest. WIS. STAT. § 767.325(1)(b)1. Whether the facts present a substantial change of circumstances is a question of law that we decide de novo. ***Harris v. Harris***, 141 Wis. 2d 569, 415 N.W.2d 586 (Ct. App. 1987), *overruled on other grounds by* ***Kenyon v. Kenyon***, 2004 WI 147, ___ Wis. 2d ___**,** 690 N.W.2d 251. However, we must "give weight to a trial court's conclusion" because the determination is "heavily dependent upon interpretation and analysis of underlying facts." ***Id.*** at 574-75.

¶5 When considering the best interest of the child, the circuit court must presume that continuing "the current allocation of decision making under a legal custody order" and continuing "the child's physical placement with the parent with whom the child resides for the greater period of time" are both in the best interest of the child. WIS. STAT. § 767.325(1)(b)2. Those presumptions are rebuttable. The factors to be considered in modifying physical placement or legal custody are those listed in WIS. STAT. § 767.24(5)(am). *See* § 767.325(5m).

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[2] It is difficult to discern distinct legal arguments from Keith's brief with the multitude of overlapping claims he makes. Equally troublesome is his practice of selectively quoting portions of testimony and the circuit court's remarks to make them contextually unsound. Keith also cites to testimony or arguments made at hearings held before Lori's 2002 motion for modification was filed. "An appellate court is not a performing bear, required to dance to each and every tune played on an appeal." ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147. To the extent we do not address some of Keith's issues, we deem them to lack sufficient merit or importance to warrant individual attention. *See* ***id.***

¶6 The circuit court found that Keith's move to a distant city was a substantial change of circumstances. Keith argues that Lori only proved that his home was more than 150 miles away by certain highway routes. Although the court granted temporary relief based on the determination that Keith had moved more than 150 miles, the change of placement was not based on the distance of the move. The court recognized that Keith's move was fait accompli. The significant fact was that previously Keith and Lori had lived within a short distance of each other and Keith's move was such a substantial distance that Lori could no longer exercise her right to midweek placement with Alice.[3] The court also found that although the parties agreed that Keith would home school Alice, Keith's home schooling had not produced demonstrable results. This was a departure from the anticipated benefits of home schooling. We affirm the circuit court's conclusion that a substantial change of circumstances occurred.

¶7 Turning to what is in the child's best interest, the circuit court recognized the rebuttable presumption that existing placement is in the child's best interest. It found the presumption was rebutted by the fact that Keith's move isolated Alice from Lori and that home schooling left Alice behind in some subjects. Keith complains that the circuit court erroneously placed the burden of proof on him. But Lori produced evidence that home schooling left Alice behind in some subjects, specifically science, social studies, and history. Lori also demonstrated that Alice caught up and excelled when returned to the classroom atmosphere. It then became Keith's burden to offer contrary evidence. We

[3] Keith argues that Lori gave up her midweek placement when she returned to work full time. There was evidence that Alice was with Lori one night a week instead of the Wednesday daytime placement.

acknowledge Keith's position that home schooling laws do not require him to keep attendance, map out curriculum, or produce test results, but without those things, Keith had no evidence that home schooling was meeting Alice's educational needs. The circuit court's finding that home schooling had not served Alice well is not clearly erroneous.

¶8 In addressing what placement is in Alice's best interest, the court went through each of the statutory factors and explained its role in the decision to give Lori primary placement. The circuit court's decision was well reasoned and reflects a proper exercise of discretion on the appropriate factors. Specifically, the court acknowledged Alice's wish to be home schooled but could not accommodate that desire in light of evidence that home schooling left her behind in some subjects. It noted that Alice enjoys a loving relationship with both parents marked by spending quality time with each, that she had no problem with a sibling in her mother's home, that she had friends in both environments, that she is able to adjust to the very different life-styles of each home, and that both parents were physically and mentally sound. The court was concerned that Alice may have a possible medical condition and the need for follow-up with a doctor. Coupled with that concern is the finding that Keith had interfered in the past with some of the medical decisions Lori made regarding Alice, including canceling dental and counseling appointments. The court noted that communication between the parties was amicable only when things were going Keith's way—that is, when he had primary placement. It found that Lori would not interfere with Keith's relationship with Alice. It questioned why Keith would move without notifying Lori of new addresses or phone numbers if he was truthful in his testimony that he never tried to minimize Lori's contact with Alice.

¶9 Keith generally attacks the findings made by the court. He believes the circuit court's decision was driven by a mistaken belief that Alice did not have her own room when residing with Keith, by gender bias, by not considering Lori's failure to facilitate a relationship between Keith and Alice, by false testimony regarding hygiene, moves and phone calls, by a belief that Keith is anti-government, by the failure to recognize that Alice's test scores would have been higher if Lori had not denigrated Keith's home schooling efforts and engaged in stressful litigation, and to punish Keith for Lori's false allegation of sexual abuse. He also claims that the circuit court denied him religious freedom by not permitting him to home school Alice. As we have already discussed, the circuit court's decision was not driven by these factors. The circuit court disavowed any concern over the living arrangements in Keith's residence but merely warned Keith to afford Alice the privacy a teenage girl needs. It addressed Keith's belief system in the freedom to educate his child as he sees fit but found that freedom was outweighed by the need to keep Alice in a classroom situation that would provide appropriate education in all subjects. The circuit court's determination of what is in Alice's best interest stands in contradiction to Keith's claims.

¶10 As to the requirement that Keith pay child support in the amount of $49 per week, Keith argues that the circuit court voided the parties' stipulation that each parent directly support Alice when she resides with that parent and that there be no financial payments between the parents. It seems that Keith is referring to the parties' April 2000 stipulation, but that stipulation is not part of the record. In any event, the stipulation does not foreclose the circuit court from ordering child support when a change in placement is made.

¶11 Keith contends the amount of child support is not in Alice's best interest since it forces her to live in poverty when she is placed with Keith. It is

presumed that child support established pursuant to the percentage standard is fair. ***Abitz v. Abitz***, 155 Wis. 2d 161, 179, 455 N.W.2d 609 (1990). The circuit court has discretionary authority to set aside the guideline percentages when it finds that the use of the standard "is unfair to the child or to any of the parties." WIS. STAT. § 767.25(1m). Keith testified that he earned $7.25 an hour as a farmhand and that he worked between twenty to fifty hours a week. The circuit court set child support at seventeen percent of a forty-hour workweek.[4] The circuit court's determination of income is a finding of fact which we will not set aside unless clearly erroneous. ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989). Keith does not cite to any evidence that child support set at the applicable percentage standard was unfair to him or Alice. It makes no difference that Keith could have sought child support, but did not, when primary placement was with him. The circuit court's child support order is properly based on current circumstances.

By the Court.—Order affirmed.

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

[4] Keith argues that the circuit court misread the original judgment of divorce as imputing income of $40,682 to Keith. Even so, the circuit court did not determine child support on imputed income and in fact relied on Keith's actual income.