COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP177 **Cir. Ct. No. 1999FA110**

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

IN RE THE MARRIAGE OF:

JOHN A. LASHUA,

PETITIONER-APPELLANT,

V.

JODI L. HANSEN-LASHUA,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waupaca County: RAYMOND S. HUBER, Judge. *Reversed and cause remanded with directions*.

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. John Lashua appeals from a post-judgment order in a divorce case. The dispositive issue is whether the court erred by not obtaining and considering the views of the children as to change of placement and

relocation. We conclude that the court erred by proceeding without this information, and therefore we reverse and remand.

¶2 John was divorced from Jodi Hansen-Lashua in October 2000. Primary physical placement of their two children was awarded to Jodi. In January 2003, John moved for modification of physical placement to an equal schedule, based on a change of circumstances in his availability to spend time with the children. However, it appears that Jodi then gave notice of intent to move herself and the children more than 150 miles to Hudson, Wisconsin, although the notice is not in the record. Apparently, John objected and modified his request to ask for primary placement, although these filings are not of record either. The court held an evidentiary hearing and granted Jodi's request to move and denied John's request for physical placement.

¶3 The parties' arguments are ostensibly divided among several issues, but underlying most of them is a dispute about the relationship between the statute relating to revision of physical placement orders, WIS. STAT. § 767.325 (2001-02),[1] and the statute pertaining to moving a child's residence within or outside the state, WIS. STAT. § 767.327. We briefly clarify that relationship. On their face, these statutes provide a narrower range of factors for the court to consider on a moving issue than on a change of placement issue. However, we previously rejected that reading and held that the factors in the moving statute are in addition to, rather than a replacement for, the broader list of factors that must be addressed

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

for change of placement. ***Hughes v. Hughes***, 223 Wis. 2d 111, 122-23, 588 N.W.2d 346 (Ct. App. 1998).

¶4 In ***Hughes*** we also addressed a related issue that is relevant to this appeal. There, the mother filed a request to move, and the father responded by filing a motion for a change of placement that was based on circumstances other than the move. ***Id.*** at 115. The mother contended that because she filed notice of her intent to move before the father filed his motion for a change in physical placement, the court could proceed only under WIS. STAT. § 767.327, the moving statute. The mother argued that, therefore, the father could be awarded primary physical placement only if he rebutted the statute's presumption in favor of maintaining the existing physical placement by showing that the move would be unreasonable and not in the best interest of the child. ***Id.*** at 120. We rejected that argument, in part because "it makes the timing of the filings the decisive factor, and that bears no relationship to the best interest of the child." ***Id.*** at 125. We held that once the parent objecting to the move filed a motion to modify physical placement based on circumstances other than the move, the trial court could consider all relevant circumstances, including the move, in deciding whether to modify physical placement and custody under § 767.325. ***Id.***

¶5 Applying ***Hughes*** to the present case, we see that this case differs factually in that John filed his motion for a change of placement *before* Jodi's request to move. This difference makes for an even more compelling argument as to why the general change-of-placement statute should be applied. If the filing of a request for a move were to have the effect of erecting a more difficult burden for the parent who is requesting a change of placement, it could encourage parents to request moves as a defense to changes of placement. Accordingly, the motions before us are to be resolved by applying the factors in the change of placement

statute, which in turn refers to the factors for making the initial determination of placement. WIS. STAT. §§ 767.325(5m) and 767.24(5).

¶6 One of John's arguments is that the court erred by failing to obtain from the guardian ad litem a statement as to the wishes of the children. He relies on WIS. STAT. § 767.045(4), which provides that the guardian ad litem shall, unless the child otherwise requests, communicate to the court the wishes of the child as to the child's legal custody or physical placement under WIS. STAT. § 767.24(5)(b). That latter statute provides that the court shall consider, among other factors, the wishes of the child, which may be communicated by the child or through the guardian ad litem or other appropriate professional. In a recent opinion describing this statute, we said it provides that the court "must" consider these factors. ***Helling v. Lambert***, 2004 WI App 93, ¶8, 272 Wis. 2d 796, 681 N.W.2d 552. John points out that his attorney, in arguing at the end of the hearing, twice noted the guardian ad litem did not address the wishes of the children, but the court did not inquire of the guardian ad litem on this point.

¶7 Jodi responds that the guardian ad litem addressed this issue in her written report to the court, when she stated that "the children love Mom and Dad and want contact with both of them." Jodi describes this as a statement of "no preference for one parent over the other." We do not regard that as a reasonable interpretation. The quoted statement in the report does not address the subject of placement, it addresses the subject of "contact." To say that the children desire to retain contact with both parents is to say that they do not wish either parent to disappear from their lives. That possibility is not at issue in this litigation, and therefore this statement is of little use. Nor does a desire for continued contact with both parents necessarily mean *equal* contact or preference. Furthermore, even if this could reasonably be interpreted as a statement of equal preference for

the parents, that is not necessarily a statement of equal preference for the two different choices of placement, which involve other factors beyond the parents themselves, such as different living locations, living arrangements, school locations and friends, and so on. In short, the guardian ad litem's statement says nothing about the children's wishes as to placement.

¶8 As we discussed above, the statutes not only provide that the guardian ad litem shall communicate the wishes of the children to the court, but that the court shall consider them. We do not believe that a guardian ad litem's failure to provide this information relieves the court of the obligation to consider the information. In other words, if the guardian ad litem does not provide this information, the court should ask for it. Such an obligation should be readily apparent when a party notes to the court the absence of this information in a manner that suggests the party wants it presented. Accordingly, we conclude that the court's placement decision in this case was made without consideration of a required factor, that being the wishes of the children. We reverse and remand for the court to obtain this information.

¶9 Having reached this conclusion, we nevertheless address the arguments that have been made regarding the court's exercise of discretion on the existing record. We do so because it is possible that the result of inquiry into the children's wishes will be that they decline to express those wishes, or that their wishes are neutral. That result would not require the circuit court to conduct a new exercise of discretion, and the court's currently existing decision would continue to control. Instead of reviewing these arguments now, we might instead remand under WIS. STAT. § 808.075 for the court to obtain this information and render a decision while the appeal remains pending. However, that process would continue to leave the parties in suspense about what the outcome of this appeal

would be in the absence of significant new information. Therefore, we take the unusual step of reversing the order, while also saying that if a remand does not produce significant new information, the court's decision is affirmed.

¶10 John argues that the court erred in its placement and moving decision by essentially considering only one factor under WIS. STAT. § 767.24(5), and that it should have considered certain other relevant factors. John argues that the court relied too heavily on § 767.24(5)(c), the relationship of the child with parents, siblings and others. In making its decision, the court stated in part:

> The major factor that led this Court to render the decision it did really was 767.24(5)(c), the interaction and the interrelationship of the child with his or her parent or parents. I'm satisfied that the important nurturing and educational relationship which is in existence and has been in existence with the children and Ms. Hansen-Lashua is somewhat more significant than that which was in existence with the children and Mr. Lashua and is the overriding factor which leads to the decision in this case.

¶11 While the court did not isolate other relevant factors in the statute individually, it did note Jodi's history of concern for and commitment to the children, and that her training as an educator was a benefit to the children. We are satisfied that this was a permissible exercise of discretion. John points to no requirement that the court address every factor. We do not agree that the court considered only one factor. For the court to say that one factor is "major" or "overriding" is an implicit acknowledgement that there are other relevant factors, perhaps including some that would support a different conclusion. It was not unreasonable for the court to regard this factor as overriding, and its decision was not unreasonable.

¶12 In stating this conclusion, we emphasize again that we are affirming this exercise of discretion only to the extent that it is not superseded by significant

new information as to the children's wishes. If the children's wishes are other than neutral or silent, it will be necessary for the court to conduct a new exercise of discretion, incorporating the new information. That decision will, of course, be subject to further review by appeal. However, if there is nothing new, the trial court can say as much in a new written order that re-incorporates the terms of the order it previously entered, and which we are now reversing. On remand, we leave it to the circuit court as to how best to obtain information about the children's wishes. However, this should be done in a manner that provides the parties with an opportunity to comment on it or submit additional evidence in response to it.

By the Court.—Order reversed and cause remanded with directions.

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