COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2498 **Cir. Ct. No. 2015FA12**

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

IN RE THE MARRIAGE OF:

ROBERT COREY BURGRAFF,

PETITIONER-RESPONDENT,

V.

AMANDA JUNE BURGRAFF,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Amanda Burgraff appeals the child custody, child placement, and property division portions of a judgment dissolving her marriage to Robert Burgraff. Amanda argues the circuit court erroneously exercised its discretion when it: (1) awarded "sole legal custody" of their child to Robert concerning educational decisions; (2) made a prospective child physical placement decision; (3) divided the value of the marital residence; and (4) refused to award Amanda half of Robert's possible future military pension payments. We reject Amanda's arguments and affirm the judgment.

BACKGROUND

¶2 Robert and Amanda were married in July 2012 and lived together in a Wisconsin home that Robert had purchased six years before the marriage. The parties have one child who was born in May 2012. After deciding she wanted to end the marriage, Amanda began relocating her residence to Kentucky in March 2014. She has been living there full-time since mid-September 2014, following Robert's deployment as a member of the Air Force Reserves. Robert continued to maintain his residence in Wisconsin.

¶3 In January 2015, Robert filed this divorce action. In an order incorporated into the October 14, 2016 divorce judgment, the circuit court awarded the parties joint legal custody of the child, except that Robert was granted impasse authority over educational decisions for the child, under which Robert had "the right to a final decision on educational decisions" if the parties could not agree on such decisions. The circuit court ordered that the parties have equal physical placement of the child to continue until the fall of the 2017-18 school year, when the child was scheduled to begin kindergarten in Wisconsin. At that time, Robert would have primary physical placement for the school year; one

week before and after the school year; one week in the summer; and every other weekend for the time the child would be with Amanda in Kentucky. Amanda was granted placement for the remainder of the summer and spring break, with placement every other weekend while the child would be with Robert in Wisconsin. Holiday placement was to alternate between the parents.

¶4 The circuit court equally divided the value of the marital property, except it determined that Robert should be awarded the premarital value of assets he brought to the marriage. As relevant to this appeal, the court equally divided the difference in value of the marital residence from the commencement of the marriage to the date of divorce, but it declined to include the decrease in the mortgage balance during that time. The court also declined to divide the marital portion of the military pension to which Robert would be entitled should he remain in the military for the requisite amount of time required to earn a pension. Amanda now appeals.

DISCUSSION

I. Legal custody.

¶5 Amanda challenges the circuit court's decision to give Robert impasse authority over educational decisions. WISCONSIN STAT. § 767.41 (2015-16),[1] authorizes a circuit court to make any provisions it deems "just and reasonable" concerning the legal custody and physical placement of minor children, subject only to the limitations imposed by statute. Child custody and

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

placement determinations are committed to the sound discretion of the circuit court. ***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). "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. In addition, we affirm the circuit court's findings of fact unless they are clearly erroneous, WIS. STAT. § 805.17(2), but we independently review any questions of law, ***Clark v. Mudge***, 229 Wis. 2d 44, 50, 599 N.W.2d 67 (Ct. App. 1999).

¶6 Amanda asserts that the impasse authority over educational decisions for the child is tantamount to awarding Robert "sole legal custody" on this particular issue—a determination that would have required the circuit court to make specific findings required under WIS. STAT. § 767.41(2)(b)2. We are not persuaded. Section 767.41(6)(b) explicitly authorizes the court to order joint legal custody but, nevertheless, to give one party "sole power to make specified decisions, while both parties retain equal rights and responsibilities for other decisions." Sole power to make educational decisions where the parties cannot agree does not constitute "sole legal custody." Thus, the court was not required to make specific findings under § 767.41(2)(b)2.

¶7 Doctor Harlan Heinz, a licensed psychologist who submitted a court-ordered custody evaluation, opined that giving Robert final decision-making authority as to education was in the child's best interest. In addition, since the

child would be residing with Robert in Wisconsin during the academic school year, it made practical sense for Robert to have final decision-making power over educational decisions. In light of Dr. Heinz's opinion and the child's placement with Robert during the school year, it was a reasonable exercise of the circuit court's discretion to give Robert impasse authority over educational decisions.

II. Physical placement.

¶8 Amanda also challenges what she asserts was an impermissible prospective placement determination, that is, placement based upon future circumstances that may not occur. Citing ***Koeller v. Koeller***, 195 Wis. 2d 660, 536 N.W.2d 216 (Ct. App. 1995), Amanda contends the circuit court erroneously exercised its discretion by awarding prospective placement to Robert contingent upon their child beginning kindergarten in the future.[2] ***Koeller***, however, is distinguishable on its facts. There, a mother who was suffering from terminal cancer and whose ex-spouse had a history of mental illness, moved the circuit court to revise a divorce judgment to grant custody of the children to her sister in the event of her incapacity or death. ***Id.*** at 662. The circuit court granted the motion and entered a prospective custody judgment. ***Id.*** at 662-63. This court reversed the judgment, concluding, in relevant part, that there was no authorization in the law for a change of custody to take effect at some unknown time in the

[2] In responding to Amanda's argument, Robert cited an unpublished per curiam opinion in his brief—an opinion that the circuit court also cited. WISCONSIN STAT. RULE 809.23(3)(a) prohibits citation of unpublished opinions as precedent or authority, "except to support a claim of claim preclusion, issue preclusion, or the law of the case, and except as provided in par. (b)." RULE 809.23(3)(b), in turn, states that *authored*, unpublished opinions issued on or after July 1, 2009, may be cited for their persuasive value. The unpublished per curiam opinion was not used to support a claim of claim preclusion, issue preclusion, or the law of the case. We admonish Robert that improper citation to an unpublished opinion in the future may result in sanctions.

future "based on circumstances that might not exist when the order is to take effect." ***Id.*** at 667-68.

¶9 Here, unlike in ***Koeller***, the circuit court did not order a prospective change in placement, but merely provided for a change based upon an undisputed and known event—the child beginning five-year-old kindergarten in the fall of 2017. Thus, ***Koeller*** is inapplicable because in that case the circumstance of the mother's future health condition could not be known, whereas here the child beginning kindergarten was known. Deciding upon a change in the placement schedule in advance of this event was an appropriate exercise of the court's discretion and saved the parties from having to return to the circuit court within a relatively short period of time to determine that issue.

¶10 Amanda nevertheless contends that the commencement of kindergarten was not certain, as Wisconsin law does not mandate school attendance until a child is six years old and the circuit court's order was predicated upon entry into five-year-old kindergarten. *See* WIS. STAT. § 118.15(1)(a). Amanda has not demonstrated that this argument was raised in the circuit court, and this court does not search the record for facts to support a party's argument. *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App 109, ¶36, 293 Wis. 2d 668, 721 N.W.2d 127. Here, the parties proceeded as though the child's kindergarten attendance in the fall of 2017 was a certainty. As a general rule, we will not consider issues raised for the first time on appeal. *See* ***Pabst Brewing Co. v. Milwaukee***, 125 Wis. 2d 437, 459, 373 N.W.2d 680 (Ct. App. 1985).

III. Division of marital home value.

¶11 Next, Amanda challenges the manner in which the circuit court determined the division of the value of the marital residence. The division of property in divorce actions is entrusted to the circuit court's discretion, and it will not be disturbed on appeal unless the court has erroneously exercised its discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. Pursuant to WIS. STAT. § 767.61(3), there is a presumption that all property acquired during marriage shall be divided equally. The statute, however, also permits the court to deviate from the equal division of property when considering certain factors.

¶12 The statutory factors include the length of the marriage; the property each party brought to the marriage; whether one party has substantial assets not subject to division; each party's contribution to the marriage, with appropriate economic value give to each party's contribution to homemaking and child care services; each party's age, physical health and emotional health; any contribution by one party to the education, training or increased earning power of the other; the earning capacity of each party; the desirability of awarding the family home to the party having physical placement for the greater period of time; the amount and duration of any maintenance or family support payments; any other economic circumstances of the parties; tax consequences to each party; any written agreement made by the parties before the marriage; and any other factor the court deems relevant to the case. WIS. STAT. § 767.61(3).

¶13 Here, Amanda does not challenge the circuit court's decision to award her half of the increased value of the home during the marriage but, rather, claims she was also entitled to half of the decrease in the mortgage balance during

the marriage. The circuit court considered what it characterized as Amanda's request "to be credited for half of all mortgage payments made during the marriage," but it denied that request on the ground that Amanda had cited no authority for her claim. Even assuming that an increase in equity of the residence due to mortgage payments made during the marriage constitutes divisible marital property, the record supports a deviation from the statutory presumption that credit for these payments should be equally divided. The circuit court properly cited several of the factors under WIS. STAT. § 767.61(3) before dividing the marital property.

¶14 The court gave significant weight to the short-term nature of the marriage, noting that Robert had brought significant assets to the marriage (the home plus several retirement accounts) while Amanda had not. Further, out of the couple's forty-eight-month marriage, it is undisputed that the parties lived separately for approximately twenty-eight of those months. Given the short length of the marriage, the parties' respective contributions to the marriage, and the significant periods of separation during the marriage, we conclude the circuit court properly exercised its discretion when it divided the increase in value of the residence as it did, without giving Amanda specific credit for the mortgage paydown.

IV. Military pension payments.

¶15 Finally, Amanda challenges the circuit court's refusal to award her half of Robert's future military pension. Robert entered the military reserves on November 1, 2009, and, as of the time of the July 2016 divorce trial, he needed another thirteen "good years" to qualify for any military pension benefits. When asked to explain what constituted "good years," Robert testified he needed to earn

a certain amount of points by participating "one weekend a month, two weeks a year." Robert conceded it would be possible to determine how many points were accumulated during the marriage.

¶16 Amanda asked for fifty percent of the marital portion of any military pension to which Robert might be entitled in the future, based upon his military service throughout their marriage. Our supreme court has held that unvested interests in pension plans must be taken into account when dividing marital property. ***Leighton v. Leighton***, 81 Wis. 2d 620, 634, 261 N.W.2d 457 (1978). In doing so, the court "must consider all the circumstances and evaluate the probability that the party who has a contingent right to a pension will eventually enjoy that pension." ***Id.*** at 635.

¶17 Here, consistent with ***Leighton***, the circuit court considered the circumstances and evaluated the probability that Robert, who has only a contingent right to a pension, will eventually enjoy that pension. The court denied Amanda's request, noting that Amanda had offered no evidence as to the nature or value of the pension. Amanda asked for the pension amount to be determined by dividing the points earned during the marriage by the total accumulated points as of the date of retirement. However, there was no evidence presented as to the number of points Robert had accumulated during the marriage or how many points he would have after an additional thirteen years. In addition, whether Robert would ever realize a pension benefit was speculative, as Robert testified his current enlistment would conclude in 2017 and he had applied for various nonmilitary positions in the private sector. In light of the lack of evidence necessary to make a reasoned valuation of the unvested military pension, and the uncertainty of Robert receiving any such benefit, the circuit court properly exercised its discretion in refusing to attempt to divide the military pension.

By the Court.—Judgment affirmed.

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