COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1443

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

IN RE THE MARRIAGE OF:

PATRICIA WATHEN,

PETITIONER-RESPONDENT,

V.

ROBERT MOORE,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Robert Moore appeals from an order amending the judgment annulling his marriage to Patricia Wathen. The appeal concerns rulings

pertaining to the parties' child custody arrangements and Moore's efforts to change them. We affirm.

¶2 The parties annulled their eleven-year marriage in 1992. The judgment provided for joint legal custody of their three children, Anthony, Natalie, and Amanda, and primary physical placement with Wathen. Several years of disputes concerning custody, physical placement, and decision-making authority ensued. In 1998, the parties stipulated to maintaining joint custody and essentially splitting physical placement evenly. The stipulation also gave Wathen impasse-breaking authority on educational issues and Moore impasse-breaking authority on medical issues, with specified limitations.

¶3 Notwithstanding the agreement, Amanda subsequently refused to spend any time with her father. When attempts to resolve the problem failed, Wathen moved for sole custody and primary placement of Amanda. Moore responded with a motion for sole custody and primary placement of all three children.

¶4 After lengthy evidentiary hearings, the trial court resolved matters by denying both parties' motions and ordering joint legal custody, and basically the same physical placement arrangements to continue. In explaining the decision, the court was highly critical of both parties for refusing to place their children's needs above the anger and hostility each felt toward the other over the last several years.[1] Consequently, the court concluded as to custody that:

[1] Addressing Moore, the court stated, "Your obsessive and incessant litigation and nitpicking would drive anyone to the brink of desperation, and it has. And it's partly the reason Ms. Wathen conducts herself the way she does." To Wathen, the court stated, "You've let your anger, your inability to separate your feelings toward Mr. Moore from the needs of the kids, you've let that harm the kids. You haven't focused on their best interests at all times."

> I think this is one of those very, very rare cases where joint legal custody that doesn't work very well is better than sole custody to either parent, because I conclude from the years of litigation and the record we have that the worst thing that could happen today for these kids would be for either parent to think they won. Neither parent has shown that they are capable of conducting themselves in a way that is in the best interest of the children when they have to deal with the other parent, and I think it would be harmful to the children if the court system gave one parent a leg up on legal custody. I think it would lead only to more problems instead of solving problems. So I don't think the burdens have been met to change the joint legal custody to sole custody.

¶5 In maintaining an equal physical placement schedule, the court emphasized that the children should be together to support each other, and that each needed to be with each parent for substantial periods. The court noted Anthony's desire for equal placement, and the need to reunite Amanda with her father after a period of alienation that was in part prompted by Wathen.

¶6 In regard to impasse-breaking authority, the court modified it to grant Wathen impasse-breaking authority over religion, marriage, driver's licenses, and all nonemergency medical care, and authority over extracurricular activities in alternate years. Moore received impasse-breaking authority over military enrollment and all school-related issues, and also over extracurricular activities in alternate years. The court ordered Moore to pay two-thirds of the guardian ad litem and psychological evaluation costs incurred in this proceeding, and Wathen one-third, based on their respective financial situations.

¶7 On appeal, Moore contends that the court misused its discretion by refusing to award him sole custody of the children, by modifying the impasse-breaking authority and awarding Wathen any such authority, and by ordering

Moore to pay two-thirds of the guardian ad litem and psychological evaluation costs.

¶8 WISCONSIN STAT. § 767.325(1)(b) (1999-2000)[2] provides that after two years, a court may modify an order of legal custody or substantially change physical placement if the modification is in the child's best interest, and there has been a substantial change of circumstances since entry of the last order affecting legal custody or physical placement. The trial court exercises its discretion in applying these standards. ***Licary v. Licary***, 168 Wis. 2d 686, 692, 484 N.W.2d 371 (Ct. App. 1992). We affirm discretionary determinations if the trial court relies on facts of record and the appropriate legal standards, and employs a rational process to reach a reasonable conclusion. ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 766, 498 N.W.2d 235 (1993).

¶9 The trial court reasonably denied Moore sole custody of the children. As Moore notes, the psychological evaluators and family court counselor strongly recommended that he receive sole custody, concluding that sole custody with one parent was best for the children, and that Moore had become a better parent in recent years. As Moore also notes, the guardian ad litem supported his motion as well. However, the court is not bound by the recommendation of experts. ***Hughes v. Hughes***, 223 Wis. 2d 111, 128, 588 N.W.2d 346 (Ct. App. 1998). As the trial court indicated, these parties have fought bitterly with each other for years, using the children as weapons and the courts as a battleground without regard to the harm they have done to the children. Under these circumstances, the court reasonably concluded that reducing or minimizing this aspect of their

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

parents' lives was in the children's best interest. The means it chose, by essentially maintaining the status quo, did not exceed its discretion in the matter.

¶10 Moore waived his challenge to the trial court's allocation of impasse-breaking authority. In its oral decision the trial court emphasized that it did not care which party exercised which authority, as long as the allocation was fair. Wathen responded with an offer to switch responsibilities with Moore, but he declined. Having refused this opportunity to change what he now claims aggrieves him, he cannot complain of error. *See* ***Zindell v. Central Mut. Ins. Co. of Chicago***, 222 Wis. 575, 582, 269 N.W. 327 (1936) (appellant cannot complain of error that the appellant induces).

¶11 Moore cannot reasonably contend that the court misused its discretion by awarding Wathen any impasse-breaking authority. Moore cites Wathen's alleged abuse of her authority on a number of occasions to demonstrate her inability to properly use her authority. Yet, all of the instances cited by Moore occurred before he stipulated to her authority over education matters in June 1998. He makes no showing that Wathen's abilities and conduct have deteriorated since then such that the trial court had no reasonable choice but to remove all of her authority.

¶12 Moore has waived his challenge to the allocation of guardian ad litem and psychological evaluation fees. The trial court assessed two-thirds of the fees to Moore strictly on financial grounds. Here, Moore contends that the trial court erred by failing to consider a number of other factors, primarily Wathen's responsibility for causing this latest round of litigation. However, he does not show that he raised this issue in the trial court, nor does our review of the record indicate that he did so. Issues raised for the first time on appeal are waived absent

exceptional circumstances. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

¶13 Finally, Wathen contends that Moore's appeal is frivolous, and asks for an award of costs and fees. A frivolous appeal is one that has no reasonable basis in law or equity, or is filed solely for purposes of harassing or maliciously injuring another. WIS. STAT. RULE 809.25(3)(c). Moore's appeal is not frivolous under either standard. We therefore deny Wathen's request.

By the Court.—Order affirmed.

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