

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 17, 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. 00-1771

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

THOMAS G. KRUK,

PETITIONER-RESPONDENT,

v.

JUDITH L. KRUK,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Judith Kruk appeals from the judgment of divorce that gave her former husband shared placement of their two children and awarded him the family home. She argues that the trial court applied the wrong legal

standard when it ordered joint custody, shared placement of the children and, further, that the trial court erroneously exercised its discretion because the facts presented at trial, specifically the psychologists' recommendations, do not support the trial court's custody and physical placement decision. Judith Kruk also complains that the trial court erroneously exercised its discretion by not considering the best interest of the children when it awarded the family home to Thomas Kruk. We affirm because the trial court applied the correct legal standard found in WIS. STAT. § 767.24 governing the trial court's initial custody and placement determinations, not that found in WIS. STAT. § 767.325.¹ The trial court also properly exercised its discretion when ordering joint custody and shared placement and in awarding the homestead to Thomas Kruk.

I. BACKGROUND.

¶2 Judith Kruk and Thomas Kruk were married in October of 1986. Two children were born to the marriage. Thomas Kruk commenced a divorce action in October of 1996. The divorce was granted, following a contested trial, on February 5, 1999.² The trial court determined that it was in the best interest of the children if the parties were given joint custody of them with shared placement; that is, placement with each parent for fifty percent of the time. The trial court also decided to award the family home to Thomas Kruk because of its concerns over Judith Kruk's unwillingness to pay the family debts.

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

² The trial was held on various dates. The trial was bifurcated, with the trial court deciding the custody and placement issues first and then addressing the property issues.

II. ANALYSIS.

¶3 Judith Kruk first submits that the trial court erred in not applying the correct legal standard when it ordered joint custody and shared placement. Whether the trial court applied the correct legal standard is a legal issue that we review *de novo*. ***Hughes v. Hughes***, 223 Wis. 2d 111, 120, 588 N.W.2d 346 (Ct. App. 1998) (“[W]hen the contention is that the trial court erroneously exercised its discretion because it applied an incorrect legal standard, we review that issue of law *de novo*.”).

¶4 Without specifically mentioning WIS. STAT. § 767.325, which requires a substantial change in circumstances before modifying a custody and placement order, Judith argues that the trial court was required to find that a substantial change of circumstance occurred before the court could change the then-existing temporary order that gave Judith primary placement of the children during the pendency of the proceedings.³ Pertinent to our discussion, the statute mandates that,

[A] court may not modify any of the following orders [including custody and physical placement] before 2 years after the initial order is entered under s. 767.24, unless a party seeking the modification ... shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child.

Judith posits that since the proceedings took over twenty-seven months—a period well over two years—the trial court could not change the temporary custody and

³ We could find no other statute except § 767.325, which is entitled “Revision of legal custody and physical placement orders,” that requires a finding of a substantial change of circumstance before modification of a custody and placement order can occur.

placement order unless it found a substantial change of circumstance had occurred. We disagree.

¶5 Here, the trial court was not modifying an initial order, the trial court was making the initial custody and physical placement order. WISCONSIN STAT. § 767.325 applies to revisions, not initial custody and placement orders. Further, initial custody and physical placement orders are governed by the provisions found in WIS. STAT. § 767.24(5).⁴ Our review of the record satisfies us that the

⁴ WISCONSIN STAT. § 767.24(5) provides:

(5) FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS. In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one potential custodian over the other on the basis of the sex or race of the custodian. The court shall consider reports of appropriate professionals if admitted into evidence when legal custody or physical placement is contested. The court shall consider the following factors in making its determination:

- (a) The wishes of the child's parent or parents.
- (b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
- (c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
- (d) The child's adjustment to the home, school, religion and community.
- (e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.
- (f) The availability of public or private child care services.
- (g) Whether one is likely to unreasonably interfere with the child's continuing relationship with the other party.
- (h) Whether there is evidence that a party engaged in abuse, as defined in s. 813.122 (1)(a), of the child, as defined in s. 48.02 (2).
- (i) Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1)(a).
- (j) Whether either party has or had a significant problem with alcohol or drug abuse.
- (k) Such other factors as the court may in each individual case determine to be relevant.

trial court utilized the factors set forth in § 767.24(5). The custody and placement order under which the parties operated while the divorce proceedings were ongoing was a temporary order. The trial court was not required to give the temporary order any deference.

¶6 Judith Kruk also submits, premised on her view that the trial court had to find a substantial change in circumstance before modifying the temporary order, that the trial court's order should not be upheld because the trial court failed to make the necessary finding of a substantial change of circumstance when it changed the temporary order giving her primary placement of the children. She also argues that the facts presented at trial, specifically the psychologists' recommendations, do not support the trial court's decision. Again, we disagree.

¶7 Custody determinations are committed to the sound discretion of the circuit court. *Hollister v. Hollister*, 173 Wis. 2d 413, 415, 496 N.W.2d 642 (Ct. App. 1992). Thus, custody determinations will not be upset unless the trial court's findings of fact are clearly erroneous or the trial court's decision presents a clear erroneous exercise of discretion. As noted earlier, the provisions of WIS. STAT. § 767.325 setting forth the factors guiding the revision of an trial court's initial custody and placement order do not apply when the trial court is making an initial custody and physical placement determination. As a result, the trial court was under no obligation to find a substantial change in circumstances when making its initial decision concerning the future custody and physical placement of the children. Further, we are satisfied that the trial court properly exercised its discretion even though it failed to adopt either of the psychologists' recommendations on custody and placement of the children.

¶8 The divorce proceedings were rancorous and protracted due, in large part, to Thomas's romantic relationship with Judith's former best friend. The trial court found that the hostility between the parties was harming the children. In its custody and physical placement decision, the trial court stated that it was fashioning an order so that the children would have the benefit of two parents and spend substantial time with both parents. While the trial court mentioned the experts' recommendations, it did not adopt either one. The trial court recalled that the psychologists' recommendations were similar, although not identical:

Now, the psychologist has indicated, Dr. Collins, that the shared placement, he doesn't see anything wrong with it. Dr. Grundle, I think his opinion is basically the same. He hedged a little bit more towards the mother. I don't think he had the total situation at hand. I respect him as a psychologist, but I think his is not so different.

In support of her conclusion that the trial court erroneously exercised its discretion, Judith argues that Dr. Collins's recommendation "does not contain any recommendation that the primary placement of the children with their mother should be changed." This is incorrect. Dr. Collins stated later in his report that "If the children's mother wishes to maintain a rigid posture on the custody question, then the pendulum swings to favoring father for sole legal custody." Nor does Dr. Grundle's report support Judith Kruk's view that the trial court's decision is contrary to the evidence. In Dr. Grundle's report, while he professed a preference for primary placement to be with Judith, he also stated that "ample time be allowed through some creative placement arrangement with father." Thus, the trial court's recollection regarding the doctor's recommendation was correct. The experts' recommendations were similar, and the trial court's decision to award shared placement of the children is compatible with the recommendations of the two doctors. Moreover, the trial court was not required to accept either of the

experts' recommendations concerning the future care of the children. In custody determinations, the trial court is not bound by an expert's opinion, not even an uncontested expert opinion. *See In re Marriage of Wiederholt v. Fischer*, 169 Wis. 2d 524, 533-34, 485 N.W.2d 442 (Ct. App. 1992).

¶9 Finally, Judith argues that the trial court erroneously exercised its discretion by failing to consider the children's best interest when it awarded the family home to Thomas. We are not persuaded by her argument.

¶10 Our standard of review for determining the fairness of a property division is whether the trial court erroneously exercised its discretion. *Schumacher v. Schumacher*, 131 Wis. 2d 332, 337, 388 N.W.2d 912 (1986). We will uphold the trial court's determinations on valuation and division as long as "the trial 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." *Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995).

¶11 We have already determined that the trial court properly exercised its discretion when it ordered joint custody with shared placement of the children. As a result, the best interest of the children was not involved in the trial court's decision to award the home to Thomas. Under the trial court's shared placement order, the children would continue to live in the home for the same amount of time, but they would be living there with a different parent. Further, the trial court stated that its reason for awarding Thomas the house was due to its concern that Judith would not pay any of the family debts. This concern was very real, as the record revealed that Judith had not paid bills assigned to her during the proceedings and had gone on "spending sprees," which further exacerbated the

family's debt problems. We are satisfied that here, the trial court's decision was a reasonable one. The decision gave Judith liquid assets out of which her debts could be paid and gave Thomas the family home in lieu of liquid assets. Accordingly, we affirm the trial court's decision.

By the Court.—Judgment affirmed.

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

