COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1675 **Cir. Ct. No. 2000FA528**

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

EAU CLAIRE COUNTY CHILD SUPPORT AGENCY,

PETITIONER,

LACEY JEAN HOWARD,

RESPONDENT,

V.

WADE STEVEN FREDERICK,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Reversed and cause remanded for further proceedings.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Wade Frederick appeals an order altering the shared physical placement of his son to award primary physical placement to Lacey Howard, the child's mother. We conclude the court erred by adopting the family court commissioner's order and guardian ad litem's recommendations without de novo review. Consequently, it improperly placed the burden on Frederick to rebut Howard's motion to change placement without her presenting evidence. Therefore, the order is reversed and remanded for further proceedings.

BACKGROUND

¶2 The material facts are not in dispute. Frederick and Howard's child was five years old at the time of the proceedings. In May 2003, Frederick and Howard filed a parenting agreement, giving both parents equal periods of physical placement. In March 2005, Howard filed a motion to modify the placement arrangement, requesting primary physical placement of the child. The family court commissioner issued a written decision keeping the shared placement schedule through the beginning of the 2006 school year, but then modifying the order to award Howard primary physical placement with shared placement during the summers.

¶3 Frederick appealed the commissioner's decision to the circuit court. At the de novo hearing, Frederick asked for a continuance so that he could obtain counsel.[1] The court rejected Frederick's motion and adopted the decisions of the commissioner and guardian ad litem, without an evidentiary hearing.

[1] The common accepted meaning of a de novo hearing is "a new hearing of a matter, conducted as if the original hearing had not taken place." BLACK'S LAW DICTIONARY 738 (8th ed. 2004).

DISCUSSION

¶4 Frederick makes two arguments: (1) the court erred by not granting his motion for a continuance to obtain counsel; and (2) the court erred by adopting the commissioner's order and guardian ad litem's recommendations without holding an evidentiary hearing to address the best interests of the child. We conclude Frederick's second argument is dispositive, and therefore, we will contain our analysis to it.

¶5 We review modifications of placement orders to determine if the decision reflects a reasonable exercise of discretion. ***Goberville v. Goberville***, 2005 WI App 58, ¶18, 280 Wis. 2d 405, 694 N.W.2d 503. We will "sustain discretionary acts 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 a reasonable judge could reach." ***Id.***, ¶7. "Discretionary decisions must be arrived at by application of the proper legal standards; the failure to apply the correct legal standards is an erroneous exercise of discretion." ***LeMere v. LeMere***, 2003 WI 67, ¶14, 262 Wis. 2d 426, 663 N.W.2d 789.

¶6 To modify a child's placement, the moving party must establish (1) "the modification is in the best interest of the child;" and (2) "there has been a substantial change in circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement." WIS. STAT. § 767.325(1)(b)1.[2] When appealed, the circuit court reviews the family court commissioner's order de novo. WIS. STAT. § 757.69(8).

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶7 Here, the court adopted the commissioner's order and guardian ad litem's recommendation, and left it to Frederick to overcome a presumption of correctness of those opinions. In essence, the court placed the burden on Frederick to establish why a change in placement was not necessary. Specifically, the court stated:

> I place great weight in what the guardian ad litem says. It's very important to me. The guardian ad litem has spent a lot of time studying the matter, interviewing you, interviewing your former wife, I suppose talking to the child, all the rest of it. So for you to come in and—who are these witnesses? Are these your witnesses?
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> ….
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> You apparently have no testimony to present to me. You just don't like the order. I'm sorry. … One side doesn't like what the decision is, but as far as I'm concerned, based on what you're doing and based on, primarily on what Mr. Field is telling me as guardian ad litem I don't think there's any chance for me to change the order ….

¶8 However, in this context, the burden was on Howard to establish a modification in placement was necessary. *See* WIS. STAT. § 767.325(1)(b)1 and WIS. STAT. § 757.69(8). By placing the burden on Frederick to present evidence to rebut the family court commissioner's order, the court erroneously exercised its discretion because it failed to apply the de novo standard of review to Frederick's appeal.

By the Court.—Order reversed and cause remanded for further proceedings.

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