COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2398

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

IN RE THE MARRIAGE OF:

PAULA R. BECVAR,

PETITIONER-APPELLANT,

V.

CHARLES F. BECVAR,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Burnett County: JAMES H. TAYLOR, Judge. *Affirmed.*

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

¶1 PER CURIAM. In this postdivorce judgment proceeding, Paula Becvar appeals an order denying her motion to move with her children to Minnesota. She claims that the court relied on inappropriate factors and that the

children's father, Charles Becvar, failed to demonstrate that the move was unreasonable. We reject her arguments and affirm the order.

¶2 The Becvars were divorced in May 1999. They have two children, who were ages ten and five at the time of the divorce. The divorce decree provided that the parties were granted joint legal custody and that Paula had primary placement "61% of the time" and that Charles would have "primary physical placement 39% of the time."[1]

¶3 In March 2000, Paula sought permission from the court pursuant to WIS. STAT. § 767.327[2] to move with the children to Duluth, Minnesota, approximately ninety miles away. Paula, who worked as a cleaning lady, planned to move to attend college, take computer courses and purchase a home. She believed that Duluth was far enough away to remove herself from what she felt was constant harassment by Charles, but close enough to allow him to continue his relationship with the children.

¶4 Charles objected to the move. The court appointed a guardian ad litem and signed an order granting Paula permission to move, provided the original placement schedule remained in effect pending the appointment and recommendation of a guardian ad litem.[3] Following a June 19, 2000, evidentiary

[1] The divorce decree scheduled Paula's time during the school year as Monday, Thursday, Friday, Saturday and Sunday, and Charles' time was from Tuesday after school to Thursday after school. During the summer months, Paula was to have the children from Friday evening to Sunday evening and Charles was to have the children from Sunday evening until Friday.

[2] All statutory references are to the 1999-2000 edition unless otherwise noted.

[3] Whether the written order accurately reflects the court's oral ruling is at issue. *See* ¶14.

hearing, the trial court denied Paula's request to remove the children's residence from Burnett County.

¶5 The court relied on Charles' testimony that he took an active role in the children's education and care. He scheduled his lunch hour so that he could have lunch with his oldest daughter at school. He testified that he helps out in the children's school classrooms. He further testified that his sister and mother have a close relationship with the children and spend significant time with them. Charles also testified that due to hostility, he and Paula did not communicate and he feared the move would interfere with his opportunity to see his children.

¶6 The court also relied on its discussion with the children in chambers. The court stated that the children gave "numerous reasons why they didn't want to move …. [I]t's not contested that the children have gotten off to a good start in school. They have got friends … they're just doing well socially in school and in the community." The court entered the following order:

> The court finds that the removal would not be in the best interest of the children because the removal would result in a drastic reduction in [Charles'] mid-week placement with the children as well as contact with [Charles'] extended family. The court is not prohibiting [Paula] from moving. If [Paula] decides to move the children shall be primarily placed with [Charles] and [Paula] may exercise placement three weekends a month as well as extended summer placement.

Paula appeals the order.

STANDARDS OF REVIEW

¶7 "Whether to modify a placement or custody order is directed to the trial court's discretion." ***Hughes v. Hughes***, 223 Wis. 2d 111, 119, 588 N.W.2d

346 (Ct. App. 1998). We affirm a court's discretionary determination when the court applies the correct legal standard to the facts of record and reaches a reasonable result. ***Id.*** at 119-20. As the reviewing court, our task is to search the record for reasons to sustain the trial court's exercise of discretion. ***Id.***

¶8 However, when 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. ***Id.*** To the extent the court's determination relies on findings of fact, we review those under the clearly erroneous standard, deferring to the trial court's assessment of weight and credibility of the evidence. WIS. STAT. § 805.17(2).

DISCUSSION

¶9 Relying on WIS. STAT. § 767.327(3),[4] Paula contends that the trial court failed to make the required finding that her proposed move was

[4] WISCONSIN STAT. § 767.327(3) provides:

> (3) STANDARDS FOR MODIFICATION OR PROHIBITION IF MOVE OR REMOVAL CONTESTED. (a) 1. Except as provided under par. (b), if the parent proposing the move or removal has sole legal or joint legal custody of the child and the child resides with that parent for the greater period of time, the parent objecting to the move or removal may file a petition, motion or order to show cause for modification of the legal custody or physical placement order affecting the child. The court may modify the legal custody or physical placement order if, after considering the factors under sub. (5), the court finds all of the following:
> a. The modification is in the best interest of the child.
> b. The move or removal will result in a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.
> 2. With respect to subd. 1.:
> a. There is a rebuttable presumption that continuing the current allocation of decision making under a legal custody order or continuing the child's physical placement with the parent with

(continued)

unreasonable. She argues that her purpose was to further her education, and that she had taken significant steps toward entering a college program and had explored housing opportunities. She claims that because her proposed move was reasonable, Charles failed to rebut the presumption found in § 767.327(3) that continuing the current placement schedule is in the children's best interests. We disagree.

¶10 The court found that Paula's proposed move would unduly disrupt the children's relationships with their father and extended family. The court found that while the proposed move was only about 100 miles, it "will only build a larger gap between the children and their father and the children's extended family." The court acknowledged that Paula wanted to better herself, but also that "the mother wants to get away from her ex-husband. That is as much a reason for this move as the mother wanting to better herself." The court also observed that the children would be losing "very close contact with two grandmothers …." The court believed it was especially important for the children to maintain relationships with the extended family in view of the dislike their parents have for one another.

¶11 The court was particularly troubled by the proposed drastic reduction in the time the children would spend with their father. It found that while the move may benefit their mother, it would not benefit the children. "[T]here is a

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> whom the child resides for the greater period of time is in the best interest of the child. This presumption may be overcome by a showing that the move or removal is unreasonable and not in the best interest of the child.
> b. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under that subdivision.
> 3. Under this paragraph, the burden of proof is on the parent objecting to the move or removal.

direct detrimental effect to pull the children away from everything they have known from the day they were born ….”

¶12 As the ultimate arbiter of the weight and credibility of the evidence, the trial court was entitled to believe Charles’ testimony. The court’s findings support its implicit conclusion that Charles’ testimony rebutted the WIS. STAT. § 767.327(3) presumption. The presumption “may be overcome” by showing that the move is unreasonable and not in the children’s best interests, but this is “not the exclusive way” to rebut the presumption. ***Hughes***, 223 Wis. 2d at 125-26 n.5. We conclude that the record reflects that the court reasonably weighed the evidence and properly determined that the evidence rebutted the presumption.

¶13 Nonetheless, Paula quotes her own testimony that the move would not be disruptive. We are unpersuaded. The trial court, not this court, judges the weight and credibility of testimony. WIS. STAT. § 805.17(2). Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court did not but could have reached. ***Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. ***Id.*** at 151-52. Because the record establishes the court placed greater weight on Charles’ testimony, we reject Paula’s contention.

¶14 Next, Paula argues that the court erroneously reversed its first ruling. This argument mischaracterizes the issue. At an initial hearing, the court adjourned the matter to permit Charles to obtain representation. The court stated that “nothing is being changed in that placement order. … She could move, but keep the placement the same.”

¶15 Paula's counsel drafted an order that the court signed and filed before the anticipated evidentiary hearing was held, providing in part:

> Petitioner is granted permission to move to Duluth, Minnesota with the minor children effective June 1, 2000. Provided, however, that the placement schedule … shall remain in effect pending the recommendation of the guardian ad litem as to how said schedule shall be modified as a result of petitioner's move.

¶16 Paula argues that the order reflects the court's decision granting her proposed move with the children, leaving only the issue of Charles' limited placement schedule to be decided. We reject this argument. The record demonstrates that the issue of the proposed move was not litigated at the previous hearing. The court indicated it had no authority to prevent Paula from moving, but the placement schedule would remain unchanged pending further proceedings. To the extent that the written order may be interpreted to conflict with the hearing transcript, the transcript governs. ***State v. Perry***, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987) (Where a conflict exists between a court's unambiguous oral pronouncement and a written judgment, the oral pronouncement controls.). Because the record shows that the court did not initially modify placement to accommodate Paula's move, the court's later denial of her motion was not a reversal of its prior order. The record fails to support Paula's contention that the court reversed itself.

¶17 Next, Paula contends that the trial court erroneously relied on hearsay, contrary to WIS. STAT. § 908.03(8). At trial, over Paula's hearsay objection, the court permitted witnesses to testify to what the children said. One witness testified that the children told her that their mother permitted them to

watch R-rated movies, did not like their mother's friend, and permitted her friend to smoke in the children's presence.

¶18 We conclude that the record fails to show that Paula's substantial rights were affected. *See* WIS. STAT. § 805.18(2). Abundant properly-admitted evidence supports the court's findings concerning the disruption in the children's lives as a consequence of Paula's proposed move. There is no indication that the movies the children allegedly watched had any bearing on the court's decision. In addition, evidence that the children did not like Paula's friend came before the court in other ways. As the court stated: "But the girls *indicated to me* that there was some kind of a barrier between the mother and the grandmother on the maternal side [and] the children were unable to articulate a specific reason why they did not like [Paula's friend]." (Emphasis added.) Because the facts contained in the alleged hearsay statements were not relied upon or were before the court in other ways, we conclude that the error, if any, related to admitting these statements was harmless.

¶19 Next, Paula argues that the court placed undue weight on the children's wishes. The court stated that the children gave it "numerous reasons why they didn't want to move …. [I]t's not contested that the children have gotten off to a good start in school. They have got friends … they're just doing well socially in school and in the community." The weight the court places on various factors is within the court's discretion. WIS. STAT. § 767.327(5m).[5] The court's reliance on the children's expression of their adjustment to school and the

[5] WISCONSIN STAT. § 767.327(5m) reads: "DISCRETIONARY FACTORS TO CONSIDER. In making a determination under sub.(3), the court may consider the child's adjustment to the home, school, religion and community."

community is not error. Paula also claims that the children's statements should carry little weight because they were coached by Charles. Whether the children's statements to the court were credible is an issue for the trial court to resolve, not this court. WIS. STAT. § 805.17(2).

¶20 Finally, Paula claims that the court placed undue weight on Paula's alleged illicit relationship. This contention is not borne out by the record. The court refrained from making any findings that Paula had an illicit relationship, stating: "I don't know" about the allegations and noting that Paula had denied them. The court simply observed that the children stated that they did not like this particular friend of their mother. This factor is relevant to the children's adjustment to home and the community. It is within the trial court's discretion to weigh the various factors. WIS. STAT. § 767.327(5). Because the record reflects the trial court's application of correct legal principles to facts properly found to reach a reasoned result, we do not overturn its decision on appeal.

By the Court.—Order affirmed.

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