COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2358 **Cir. Ct. No. 2001FA6696**

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

IN RE THE MARRIAGE OF:

MARIA OKUNEVA RATH,

PETITIONER-APPELLANT,

V.

DAVID RATH,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed in part, reversed in part and cause remanded with directions.*

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

¶1 KESSLER, J. Maria Okuneva Rath appeals from trial court orders that modified both physical placement of the parties' child and the child support that David Rath had been paying to Maria.[1] On appeal, Maria argues that the trial court erroneously: (1) determined that a substantial change in circumstances had occurred; (2) changed the placement schedule; (3) failed to schedule a hearing on Maria's motion for reconsideration; (4) entered the child support order after Maria filed a request for substitution; and (5) entered the child support order without making requisite findings.[2] We reject her arguments and affirm the orders, with one exception: we conclude that the trial court did not make the necessary findings and therefore erroneously exercised its discretion when it entered the December 12, 2007 child support order. Thus, with respect to that order, we reverse and remand this matter back to the Honorable Maxine A. White with directions that she make necessary findings and explain the reasoning behind her exercise of discretion.[3] As to all other issues, we affirm.

BACKGROUND

¶2 This divorce action began in November 2001. A default divorce was granted in October 2002.[4] The judgment included a stipulation as to custody,

[1] Because the parties' last names are the same, we will refer to the parties by their first names.

[2] Both David and the guardian ad litem urge us to affirm the orders.

[3] We recognize it is rare that this court directs that a case be returned to a specific trial judge, but due to the significant amount of time spent litigating this matter, we believe it is appropriate that Judge White be given an opportunity to make the necessary findings and explain her exercise of discretion.

[4] The Honorable Michael J. Dwyer granted the judgment of divorce. In August 2004, the Honorable Maxine A. White took over Judge Dwyer's family court calendar.

placement and child support. The parties agreed to joint legal custody of the child, who was born in 2001, with primary placement to Maria and alternate placement to David on Sundays from 10:30 a.m. to 7:00 p.m. Based on David's annual income of $37,000, child support was set at $527 per month plus additional shared expenses.

¶3 Placement disputes arose within a year of the divorce judgment, ultimately resulting in referral for mediation which did not resolve the disputes. In September 2005, the trial court appointed a guardian ad litem. Numerous motions, hearings and related court activity ensued.

¶4 In January 2007, the trial court issued an order finding Maria in contempt based on a letter from her counsel to David's expert witness. The court also continued the underlying motion to modify placement. While the placement dispute proceeded, Maria appealed the contempt finding to this court. While the appeal was pending, the trial court continued to preside over the placement and child support dispute, ultimately conducting a two-day hearing on June 20 and 21, 2007. At the conclusion of the hearing, the court announced its findings and order from the bench. A written order reflecting that ruling was signed on July 10, 2007. Maria moved for reconsideration of the placement decision, which was denied by the trial court without a hearing. This motion for reconsideration is discussed in greater detail *infra*.

¶5 Both at the conclusion of the hearing and in its written order, the trial court indicated that it would issue a separate order for child support after receiving the parties' updated financial declarations, copies of their 2006 tax returns and current statements of their year-to-date income. On November 15,

2007, the court also directed the parties to submit proposed child support orders based on the court's custody and placement decisions.

¶6 Before the trial court decided the child support issue, but after it decided the custody and placement issues, we issued our decision on Maria's contempt appeal. In an October 10, 2007 decision, this court reversed the contempt finding and remanded for an evidentiary hearing on the contempt issue. *See* ***Rath v. Rath***, 2007AP841, unpublished slip op. (WI App Oct. 10, 2007). The case was remanded to the circuit court in late November 2007.

¶7 On November 30 and December 3, 2007, Maria filed a request for substitution of the trial judge, relying on WIS. STAT. § 801.58(7) (2007-08).[5] This substitution request is discussed in greater detail *infra*.

¶8 All parties responded to the trial court's request for child support proposals with letters filed on December 3, 2007. David calculated each party's income based on wage stubs. He asserted that Maria's income was greater than what was reported on her tax returns and argued that his income for child support purposes was $2546 per month and Maria's was $3697, resulting in a monthly support obligation for Maria to David of $147 per month. Maria argued that the adjusted gross income on the party's tax returns showed her annual income was $38,663 and David's was $38,759. She alleged that the shared placement formula required David to pay her $354.86 per month "plus twenty-eight percent of the variable costs." The guardian ad litem, who did not consider $5663 of income Maria had from rental property, concluded that Maria's income for support

[5] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

purposes was $39,602 and David's was $38,760 and calculated that David would owe $374 per month during 2007. However, the guardian ad litem also concluded that David had been overpaying support in an amount roughly equal to his 2008 obligation. Thus, the guardian ad litem recommended that child support should be held open as of January 1, 2008, and that the parties should share the child's variable expenses equally.

¶9 On December 12, 2007, the trial court completed and signed a form entitled "Kids Order Summary." The form contains the names and dates of birth of David, Maria and their child. In the line for "Child Support" the court wrote: "Hold open to both" (emphasis in original), with an effective date of January 1, 2008. In the "Other" line at the bottom of the form, the court wrote: "This order is based on the post J[udgment] submissions of [the parties] and GAL on 12/3/07." This appeal follows.

DISCUSSION

¶10 Maria challenges the orders concerning physical placement and child support. She argues that the trial court erroneously: (1) determined that a substantial change in circumstances had occurred; (2) changed the placement schedule; (3) failed to schedule a hearing on Maria's motion for reconsideration; (4) entered the child support order after Maria filed a request for substitution; and (5) entered the child support order without making requisite findings. We examine these arguments in two categories: the modification of physical placement and the child support order.

I. Modification of physical placement.

A. Legal standards.

¶11 To substantially modify placement more than two years after the most recent placement decision, WIS. STAT. § 767.451(1)(b) requires a showing that "[t]here has been a substantial change of circumstances since the entry of … the last order substantially affecting physical placement" and that the change "is in the best interest of the child." *See* ***id.*** The nonexhaustive list of factors a court should consider when determining custody or placement, to the extent the court determines they are relevant to the facts of the case, are codified in WIS. STAT. § 767.41(5). A court may consider the totality of the circumstances when determining both whether there is a substantial change in circumstances and whether a change (and what change) is in the best interest of the child. *See* ***Greene v. Hahn***, 2004 WI App 214, ¶¶25, 27, 277 Wis. 2d 473, 689 N.W.2d 657.

¶12 WISCONSIN STAT. § 767.451(1)(b) creates a rebuttable presumption that maintaining custody, decision making and placement as it has existed for more than two years is in the child's best interest. The statute instructs that, as relevant here, "[a] change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification." Sec. 767.451(1)(b)3. The statute does not prohibit consideration of changed economic circumstances or marital status in conjunction with other relevant factors.

¶13 In ***State v. Lucas***, 2006 WI App 112, 293 Wis. 2d 781, 718 N.W.2d 184, we summarized the applicable standards of appellate review of an order modifying physical placement:

> On review, whether a party seeking to modify an existing legal custody order or physical placement order has established a substantial change in circumstances is a question of law that we decide *de novo*. When doing so, however, we must give weight to a trial court's decision because the determination is heavily dependent upon an interpretation and analysis of underlying facts. With respect to the best interest determination, we consider whether the trial court has properly considered and weighed the appropriate factors to determine what is in the child's best interest, using the erroneous exercise of discretion standard.

Id., ¶23 (citations and internal quotation marks omitted).

B. Maria's challenge to the placement order.

¶14 On appeal, Maria does not challenge any specific part of the new placement order. Instead, she argues that the entire order is improper because there was no evidence to support a finding of a substantial change in circumstances. Moreover, she contends, even if there was a substantial change in circumstances, the trial court erroneously exercised its discretion when it concluded that a change in the placement order was warranted. We conclude that under the facts found by the trial court, there was a substantial change in circumstances. Further, we conclude that the trial court did not erroneously exercise its discretion when it determined that modifying the placement schedule was in the child's best interest.

¶15 First, Maria argues that the finding that there was a substantial change in circumstances was improper because it was contrary to an August 2005 finding made by an assistant family court commissioner that heard the preliminary aspects of this long and contentious proceeding. What Maria ignores is that the commissioner's findings are not binding on the trial court. *See* ***Wetzel v. Wetzel***, 35 Wis. 2d 103, 108, 150 N.W.2d 482 (1967) (family court commissioner's

findings and recommendations not binding on trial court and court cannot be said to have erroneously exercised discretion for failing to follow any of the commissioner's recommendations).

¶16 Next, we consider the trial court's conclusion that a substantial change in circumstances was established. On June 20 and 21, 2007, the trial court heard the motion to modify the placement schedule that had been established in the 2002 divorce judgment. The trial court ruled from the bench at the close of testimony. It made various findings and concluded that David had shown a substantial change in circumstances since the time of the divorce, stating:

> [T]here are two parents here, one who occupied a totally different position at the time of the divorce than he occupies now. There is no real dispute in the record that he was different then, substantially different then, than he is now…. Two experts told us [David] was pretty down, low, depressed. He was passive to the point of it being a negative infraction [sic].…
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> ….
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> … [At the time of the divorce the parties] agreed that [David] was sick, he was mentally and physically sick, that he was sociologically and everything out of wack [sic]. And Maria stepped in, and that was a good thing.…
>
> ….
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> … [T]he order that you're asking me to consider today is old … it's almost just as old as [the child] is. And so … I looked at the circumstances as they then existed, and I tried to figure out what are the substantial change[s] in circumstances.… [D]ad has had a restorative, rehabilitative state brought on through medical treatment, changes in his lifestyle circumstances, stability, two new kids, a new person in his life and reattachment to [his child] at a later age. These records of restoration and difference, and the substantial nature of them are solidly in David's favor created by, not just his witness, but the witness brought in by Maria.… [David] certainly speaks today … as someone who is in touch with reality, who was able to respond to questions responsively, who was able to give

> details about the progression of the illness that he had, the onset of it, some of the circumstances that caused it, and the factors that resurrected him to where he is today.
>
> So it's clear in this record there are substantial changes in circumstances in David's record and also in the life of [the child]….
>
> All of these factors taken together operate to create a different environment and circumstances affecting the best interests of [the child], who is the focus of this order today.
>
> … The facts [and] the law render this a substantial change in circumstances justifying a modification. And it justifies more than an itty-bitty movement of the line.

¶17 Subsequently, in its written order, the trial court stated that "there is extensive evidence in this record that modification of the current order is in the best interest of the minor child and that there has been a substantial change of circumstances since the entry of the last order affecting physical placement of the child." Specifically, as a factual basis for its conclusion that there was a substantial change in circumstances, the written order stated that it had considered:

> both experts'[6] opinions that there have been significant changes in [David's] mental/emotional status since the Judgment of Divorce was entered; the fact that the child was then a 15 month old nursing infant, and is now a 6 year old 1st grade student; the fact that [David] has remarried; the fact that when the child is placed with [David] he will be in a two-parent intact family along with his 2 siblings, his father, and his competent step-mother; the fact that [David's] living and employment situations have both significantly changed for the better since the time of the divorce; and the fact that the conditions which existed at the time the parties stipulated to the current, extremely restricted placement schedule no longer exist and such schedule is neither necessary to protect the child nor in the child's best interest.

[6] Dr. Stephen Emiley, Ph.D, testified on behalf of David and Dr. Itzhak Matusiak, Ph.D, testified on behalf of Maria.

¶18 We conclude that while any single fact found by the trial court might not, in isolation from the whole, establish a substantial change in circumstances, the totality of the facts found by the trial court more than five years after the initial order persuasively demonstrate a substantial change in the circumstances of the parties and of the child. *See* ***Greene***, 277 Wis. 2d 473, ¶¶25, 27 (court considers totality of the circumstances to determine if there has been a substantial change in circumstances).

¶19 Having concluded that the trial court correctly concluded there had been a substantial change in circumstances, we consider the trial court's determination that modification of the placement order was in the child's best interest. The trial court stated on the record the various factors which it considered relevant to whether modification of placement by increasing the placement with David was in the best interest of the child. These factors included: the child's current age; the intellectual capacity and general good mental health of the child; the wishes of the child; the need expressed by both experts for a male child to have significant contact with his father; the relationship of the child to his stepmother and stepsiblings; the child's stated love for all three parents and stepsiblings; the health of the parents and their intellectual capacities; the lack of any significant emotional problem currently suffered by either party or the child; and the refusal of David and Maria to talk with each other. Specifically, the court stated:

> [T]here's a little boy here that was not here in the way he is present today, as a six-year-old.… He has a voice today and has spoken loud and clear…. [The child] is a wonderful little boy who loves all three of his parents.… Both [experts] agreed that there's nothing wrong with the parents, [and] there is nothing significantly out of wack [sic] with [the child], he loves all of you….

> The strongest indicator of a serious problem in this case is one that Maria has with David and David has with Maria, [they] don't talk. [They're] like blocks of stone….
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> ….
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> … [The child] is not 16 months old, he's six years old, and he needs his father, and he needs his mother, and he needs his step-siblings and he needs his step[-]mom.
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> ….
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> … [David's] contacts must have generated some type of spirited desire on the part of [the] child to want more.
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> … [B]oth of the experts in this case … stuck to the premise that, if you want to do something to create a productive child and recognize his best interest, you got to get … a male child attached to his daddy or he's going to fail.
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> … [T]he testimony of both of the experts … is not in dispute and not contradictory.… [W]hat's in the best interest of [the child] is that recited in the [GAL's] memorandum…. I am adopting in total the schedule … and it begins effective June 27, 2007….

¶20 In its written order, the trial court reiterated its determination that the previous placement schedule, which provided extremely limited placement to David, was no longer in the child's best interest, concluding that the "extremely restricted placement schedule" was "neither necessary to protect the child nor in the child's best interest."

¶21 Having reviewed the record, we conclude that the trial court did not erroneously exercise its discretion. Particularly in the context of the extremely limited placement in the original placement order, the facts, as found by the trial court, support the trial court's conclusion that "modification of the current placement order is in the best interest of the child." *See* WIS. STAT. § 767.451(1)(b).

C. Maria's motion for reconsideration.

¶22 On June 23, 2007, Maria filed a motion for reconsideration of the trial court's order concerning a change in placement. The trial court issued a scheduling order on the motion. Ultimately, even though Maria specifically requested a hearing on the motion on several occasions, the trial court did not schedule a hearing on the motion and, instead, on October 11, 2007, issued a written order denying the motion for reconsideration.[7]

¶23 On appeal, Maria's opening brief offers a one-paragraph argument that the trial court erroneously exercised its discretion when it failed to provide her a hearing. She contends the court was required to provide her a hearing and cites WIS. STAT. § 805.17(3).[8] Maria does not identify which part of this statute entitles

[7] Maria argues her motion was already denied by operation of law as of October 8, 2007, because the trial court did not act within ninety days of the motion. Our conclusion is the same whether the motion was denied by operation of law or by the trial court's written order.

[8] WISCONSIN STAT. § 805.17(3) provides:

> **(3)** RECONSIDERATION MOTIONS. Upon its own motion or the motion of a party made not later than 20 days after entry of judgment, the court may amend its findings or conclusions or make additional findings or conclusions and may amend the judgment accordingly. The motion may be made with a motion for a new trial. If the court amends the judgment, the time for initiating an appeal commences upon entry of the amended judgment. If the court denies a motion filed under this subsection, the time for initiating an appeal from the judgment commences when the court denies the motion on the record or when an order denying the motion is entered, whichever occurs first. If within 90 days after entry of judgment the court does not decide a motion filed under this subsection on the record or the judge, or the clerk at the judge's written direction, does not sign an order denying the motion, the motion is considered denied and the time for initiating an appeal from the judgment commences 90 days after entry of judgment.

her to a hearing. Further, although she argues that "the trial court should have afforded Maria an opportunity to be heard consistent with procedural and substantive due process," she does not explain this argument, providing only a reference to ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306 (1950). We decline to address this issue because it is inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address arguments that are inadequately developed). Maria provides additional arguments on this issue in her reply brief, suggesting that WIS. STAT. §§ 801.15(4) and 802.01(2)(e) affect the interpretation of § 805.17(3), but we decline to consider these arguments. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief.").

II. Modification of child support.

¶24 Maria presents two challenges to the trial court's amendment of the child support order. First, she argues that the court lacked competency to issue an order modifying child support after she filed a motion to substitute. *See* WIS. STAT. § 801.58(2). Maria filed substitution requests on November 30 and December 3, 2007, citing as a basis for the substitution requests § 801.58(7),[9] which she apparently believed would apply because the court of appeals reversed

[9] WISCONSIN STAT. § 801.58(7) provides:

> If upon an appeal from a judgment or order … the appellate court … reverses or modifies the judgment or order as to any or all of the parties in a manner such that further proceedings in the trial court are necessary, any party may file a request under sub. (1) within 20 days after the filing of the remittitur in the trial court whether or not another request was filed prior to the time the appeal or writ of error was taken.

the contempt finding. However, Maria does not mention a line of cases, beginning in 1874, rejecting for public policy reasons application of this or similar predecessor judicial substitution statutes after remittiturs in most ongoing family law cases. The rule these cases established is generally known as the ***Bacon-Bahr***[10] rule. Pursuant to that rule, "no right to substitution arises in proceedings to modify divorce judgments, even under … § 801.58(7)." ***State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court for Milwaukee County***, 2000 WI 30, ¶42 n.3, 233 Wis. 2d 428, 608 N.W.2d 679 (Wilcox, J., concurring) (citing ***Parrish v. Kenosha County Circuit Court***, 148 Wis. 2d 700, 703-05, 436 N.W.2d 608 (1989)). Thus, Maria was not entitled to substitution and the filing of her substitution motions did not prevent the trial court from deciding the child support issue.

¶25 Second, Maria argues that the child support modification should be reversed because the trial court did not make adequate findings or explain its reasons for modifying the child support order. We agree. Therefore, we reverse the child support modification order and remand with directions that the judge who heard the custody and support proceedings make the requisite findings.

¶26 The legislature has created a system with a degree of financial predictability by establishing formulas to calculate child support which are based on the income of each parent and the amount of time the child spends in the household of each parent. There is a presumption that the formulas apply, *see*

[10] *See* ***Bacon v. Bacon***, 34 Wis. 594 (1874); ***Bahr v. Galonski***, 80 Wis. 2d 72, 257 N.W.2d 869 (1977).

WIS. STAT. § 767.511(1j),[11] and a prescribed method of calculating child support, with a long list of factors a court may consider if it wishes to deviate from the applicable formula, *see* § 767.511(1m).[12] If the court deviates from the formula, the court must state either in writing or on the record what payment the presumptive formula would have required, how much the order deviates from the formula, why it concluded the formula was unfair to a party or the child and its reasons for the amount of the modification. *See* § 767.511(1n).[13] In order to do the necessary calculations, it is essential to determine the income of each parent which is available for child support.

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[11] WISCONSIN STAT. § 767.511(1j) provides: "PERCENTAGE STANDARD GENERALLY REQUIRED. Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department under s. 49.22(9)."

[12] WISCONSIN STAT. § 767.511(1m) provides in relevant part:

> DEVIATION FROM STANDARD; FACTORS. Upon request by a party, the court may modify the amount of child support payments determined under sub. (1j) if, *after considering the following factors*, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties….

(Emphasis added; list of factors omitted.)

[13] WISCONSIN STAT. § 767.511(1n) provides:

> DEVIATION FROM STANDARD; RECORD. If the court finds under sub. (1m) that use of the percentage standard is unfair to the child or the requesting party, *the court shall state in writing or on the record the amount of support that would be required by using the percentage standard, the amount by which the court's order deviates from that amount, its reasons for finding that use of the percentage standard is unfair to the child or the party, its reasons for the amount of the modification and the basis for the modification.*

(Emphasis added.)

¶27 A child support order can be revised where there has been a substantial change in circumstances. *See* WIS. STAT. § 767.59(1f). "Once a substantial change in circumstances has been shown, the trial court must exercise its discretion as to modification of child support." ***Jalovec v. Jalovec***, 2007 WI App 206, ¶21, 305 Wis. 2d 467, 739 N.W.2d 834. "An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). "The [trial] court's articulation of its reasoning process is essential in reaching a reasonable determination and to aid [an appellate] court in reviewing the discretionary decision." ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 295, 544 N.W.2d 561 (1996). Applying these standards here, we conclude that the trial court erroneously exercised its discretion as to child support by not making specific findings on the record or in a written order that would explain its reasoning.

¶28 At the conclusion of testimony at the hearing on custody, placement and child support modification, the trial court stated:

> I want to consider the W-2's, the tax returns from last year, and at least three months of pay records for 2007, and an updated financial disclosure statement through today for each party.… I will make a child support order consistent with the placement schedule and the earnings' records, and I will set that modification in an order and allow the parties five business days to respond to it.
>
> I am also directing that the parties share in the same percentage space [sic] the variable expenses, uncovered expenses.

¶29 As noted, financial statements submitted by the parties on December 3, 2007, agree on nearly nothing. *See supra*, ¶8. The trial court order contains no

finding of the income of either parent, no finding of the amount of income of either that would be child support under the applicable percentage formula, no explanation of why such a payment would be unfair to a party or the child, and no explanation of the reason for deviating from the percentage formula by ordering no support from either parent. We can only conclude that the factors in the applicable support statute, WIS. STAT. § 767.511(1m), were not addressed on the record in court or in the order issued. While we recognize that this case has been a long time in the trying, and that the parties now face the prospect of additional litigation unless they can come to a child support agreement the court can approve, we have no alternative but to reverse and remand so that the judge who heard the custody and child support proceedings can make necessary findings based on the specific requirements of the applicable statutes and regulations.

CONCLUSION

¶30 For all the foregoing reasons, we affirm the trial court orders with respect to custody and placement, but we reverse and remand the child support order with directions. We direct that on remand this case be remanded to the Honorable Maxine A. White with directions that she make necessary findings and explain the reasoning behind her exercise of discretion. Once those findings are made and a new final order is entered, if either party is aggrieved by the final child support order, the party may appeal using the standard appeals process.

By the Court.—Orders affirmed in part, reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.