COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1521 **Cir. Ct. No. 96FA961107**

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

IN RE THE MARRIAGE OF MATTHEW MANSKE,
PETITIONER V. JENNIFER MANSKE,
N/K/A JENNIFER HATALA, RESPONDENT:

BARBARA LACH AND ROBERT LACH,

PETITIONERS-RESPONDENTS,

V.

JENNIFER HATALA,

RESPONDENT-APPELLANT,

MATTHEW MANSKE,

RESPONDENT-(IN T.CT.).

APPEAL from an order of the circuit court for Milwaukee County: PATRICK T. SHEEDY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jennifer Hatala appeals the order giving custody and primary placement of her two daughters to her mother, Barbara Lach. She argues that the trial court applied the wrong standard in determining custody and erroneously exercised its discretion when it found that it was in the children's best interests to award custody to their grandmother. Further, Hatala submits that the trial court erred in ordering her to reimburse her mother and stepfather for half of the costs of the psychological examinations of the parties. She contends they paid these fees voluntarily. We affirm.

I. BACKGROUND.

¶2 The genesis for this litigation was the marriage of Jennifer Hatala to her first husband, Matthew Manske, on April 9, 1988. At the time of the marriage, Hatala was sixteen years old and Manske was thirty-six years old. Two children, who are the subject of this suit, were born during the marriage. Melissa was born January 7, 1991, and Ashley was born November 9, 1992. While the testimony was conflicting as to the actual amount of time the children spent with their grandmother, Hatala agreed that during her marriage to Manske, Barbara Lach provided day care for her, as Manske worked full time and Hatala worked and went to school.

¶3 Hatala and Manske divorced on April 21, 1997. Pursuant to the marital settlement agreement, the parties agreed to joint legal custody of the girls, with Hatala having primary placement. However, Lach testified that the children continued to remain in her care during this time.

¶4 On October 31, 1997, Hatala married Mike Hatala. After her divorce and second marriage, Hatala experienced some mental health problems, which led to her hospitalization and arrest on several occasions. Lach continued to

provide care for the girls, including overnights. In April 1999, Hatala's new husband received a job promotion that took him out of state. Hatala sent written notice to Manske advising him of her intent to move outside the state of Wisconsin with the girls. Manske formally objected to the move. As a result, Hatala's husband moved to New Hampshire and Hatala and the children remained in Wisconsin, staying with the Laches. Before the matter could be resolved, Hatala left Wisconsin with the children after an argument with the Laches. Manske then filed a motion seeking a change of placement. After a hearing, the family court commissioner ordered the children to be returned to Wisconsin, and gave temporary placement of them to Hatala's mother and stepfather, Robert Lach. Hatala then petitioned for a *de novo* review in the circuit court. In the interim, the trial court continued the order giving temporary custody of the children to the Laches.

¶5 The Laches, who up to this time were caring for the children but were not parties to the action, filed a motion seeking to compel all the parties to see a psychologist and requesting that both Hatala and Manske pay child support. Later, they filed a petition seeking custody and placement of the children. Manske then withdrew his motion seeking to modify placement and is not a party to this appeal. After a contested trial, the trial court found there were compelling reasons, including abandonment and persistent neglect of parental responsibilities, that, when considering the best interests of the children, required giving custody and primary placement of the children to Barbara Lach, with periods of placement with Hatala at times specified by the court.

II. ANALYSIS.

A. The trial court applied the correct legal standard.

¶6 Hatala argues that the trial court's finding that there were compelling reasons for the grant of custody to Barbara Lach was a sham with no support in the record, and the trial court inappropriately applied the best interests of the child standard. Thus, she posits that the trial court erred in its custody determination because it improperly applied the best interests of the child standard to its determination.

¶7 The interpretation of a statute is a question of law which this court reviews *de novo*. ***Hackl v. Hackl***, 231 Wis. 2d 43, 46, 604 N.W.2d 579 (Ct. App. 1999). Courts will not interpret a statute in a manner that will abrogate the prevailing case law unless such intent is clear from the language of the statute. ***Honthaners Rests., Inc. v. LIRC***, 2000 WI App 273, ¶24, 240 Wis. 2d 234, 621 N.W.2d 660.

¶8 WISCONSIN STAT. § 767.24 (1999-2000)[1] authorizes a trial court to award custody and physical placement of children and contains the factors that a trial court should consider in so doing. WIS. STAT. § 767.24(3) authorizes the award of custody to an agency or a relative.[2] Although an award of custody to a

---

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

[2] WISCONSIN STAT. § 767.24(3) provides:

> **767.24 Custody and physical placement.**
>
> ….

(continued)

(3) CUSTODY TO AGENCY OR RELATIVE. (a) If the interest of any child demands it, and if the court finds that neither parent is able to care for the child adequately or that neither parent is fit and proper to have the care and custody of the child, the court may declare the child to be in need of protection or services and transfer legal custody of the child to a relative of the child, as defined in s. 48.02 (15), to a county department, as defined under s. 48.02 (2g), or to a licensed child welfare agency. If the court transfers legal custody of a child under this subsection, in its order the court shall notify the parents of any applicable grounds for termination of parental rights under s. 48.415.

(b) If the legal custodian appointed under par. (a) is an agency, the agency shall report to the court on the status of the child at least once each year until the child reaches 18 years of age, is returned to the custody of a parent or is placed under the guardianship of an agency. The agency shall file an annual report no less than 30 days before the anniversary of the date of the order. An agency may file an additional report at any time if it determines that more frequent reporting is appropriate. A report shall summarize the child's permanency plan and the recommendations of the review panel under s. 48.38 (5), if any.

(c) The court shall hold a hearing to review the permanency plan within 30 days after receiving a report under par. (b). At least 10 days before the date of the hearing, the court shall provide notice of the time, date and purpose of the hearing to the agency that prepared the report, the child's parents, the child, if he or she is 12 years of age or over, and the child's foster parent, treatment foster parent or the operator of the facility in which the child is living.

(d) Following the hearing, the court shall make all of the determinations specified under s. 48.38 (5)(c) and, if it determines that an alternative placement is in the child's best interest, may amend the order to transfer legal custody of the child to another relative, other than a parent, or to another agency specified under par. (a).

(e) The charges for care furnished to a child whose custody is transferred under this subsection shall be pursuant to the procedure under s. 48.36 (1) or 938.36 (1) except as provided in s. 767.29 (3).

relative or agency under § 767.24(3) is accomplished by using the CHIPS procedure found in the Children's Code, the case law carves out another method for awarding children to a third party.

¶9 In ***Barstad v. Frazier***, 118 Wis. 2d 549, 348 N.W.2d 479 (1984), our supreme court stated:

> We conclude that the rule to be followed in custody disputes between parents and third parties is that a parent is entitled to custody of his or her children unless the parent is either unfit or unable to care for the children or there are compelling reasons for awarding custody to a third party.

Id. at 568. Applying ***Barstad***'s "compelling reasons" standard, this court explained: "The birth-parent need not, however, be found to be 'unfit' at the time of the proceeding in order for the best-interests standard to kick in; all that is required is that the birth-parent has abdicated his or her responsibilities to care for the child." ***Richard D. and Sally D. v. Rebecca G.***, 228 Wis. 2d 658, 663-64, 599 N.W.2d 90 (Ct. App. 1999). "As a general matter, but not invariably, the child's best interest will be served by living in a parent's home. However, if circumstances compel a contrary conclusion, the interests of the child, not a supposed right of even a fit parent to have custody, should control." ***Barstad***, 118 Wis. 2d at 567 (citation omitted).

¶10 Here, the trial court articulated the correct standard:

> The Court also finds that the mother initially was an unfit mother and unable to care for the children. Later, as time passed, there were *other compelling reasons why custody should be granted to her mother, Barbara Lach*, and that includes abandonment and persistent neglect of parental responsibilities.

(Emphasis added.) Thus, the trial court utilized the "compelling reasons" standard before looking to the best interests of the children. This was the proper standard to apply.

B. Evidence supports the trial court's award.

¶11 Hatala argues no compelling reasons were ever proven. Consequently, we review the evidence for support of the trial court's conclusion that compelling reasons, coupled with the best interests of the children, required awarding custody to their grandmother. When we test the sufficiency of the facts of record to sustain a decision, we do not search for facts contrary to it; instead, we will look for reasons to sustain the circuit court's decision. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968).

¶12 A trial court has wide discretion in determining custody matters, and ordinarily its decision will not be upset unless there is evidence of a clearly erroneous exercise of discretion. *See* ***Pfeifer v. Pfeifer***, 62 Wis. 2d 417, 422, 215 N.W.2d 419 (1974). "The exercise of discretion requires judicial application of relevant law to the facts of record to reach a rational conclusion." ***State v. James P.***, 180 Wis. 2d 677, 683, 510 N.W.2d 730 (Ct. App. 1993). While, as in all discretionary acts of a court, reasonable persons may sometimes differ in the outcome, all that this court needs to find to sustain a discretionary act is that the circuit court considered the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable

judge could reach. *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Moreover, factual findings of the court will not be overturned unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶13 ***Barstad*** explained: "Compelling reasons include abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or other similar extraordinary circumstances that would drastically affect the welfare of the child. If the court finds such compelling reasons, it may award custody to a third party if the best interests of the children would be promoted thereby." ***Barstad***, 118 Wis. 2d at 568-69. Further, a complete failure to assume any significant responsibility for the child may well constitute a compelling reason warranting an award of custody to a non-parent. *See* ***Howard M. v. Jean R.***, 196 Wis. 2d 16, 24-25, 539 N.W.2d 104 (Ct. App. 1995) ("[F]ailure to exercise parental responsibilities may result in the forfeiture of constitutional rights to custody or visitation.").

¶14 The trial court found that Hatala had persistently neglected her parental responsibilities to her daughters and had abandoned them. Contrary to Hatala's characterization of the evidence, the testimony of various witnesses supports the trial court's findings.

¶15 Barbara Lach testified that the children, who were living with her at the time of the trial, had been left almost totally in her care since they were infants. Lach and her husband testified that she first began to provide day care for the girls as infants, then Hatala and Manske left them overnight, and then later left them for weeks at a time. Lach testified that after the divorce began, neither parent saw the children for almost three months. A neighbor of the Laches confirmed the Laches' testimony. He testified to seeing the girls almost daily at the Lach home for about

seven years, and often heard them called inside to go to bed. Lach told the court that Hatala showed little patience with the girls, and occasionally called them derogatory names. She would often return the children earlier than expected, claiming she could not handle them. While Hatala did not totally abandon the girls, as she would occasionally care for them, it was clear she did not take significant responsibility for them; the girls consider their home to be that of their grandmother and her husband.

¶16 The children's teachers also confirmed that Barbara Lach was the primary parent and normally the contact person for the children. Even Manske, whose testimony was generally favorable to Hatala, was forced to admit that in his application for social security, he stated that the children were living with their maternal grandmother. Moreover, in an affidavit filed in support of his earlier motion for custody, he claimed Hatala was "subjecting our children to emotional damage and abuse."

¶17 Evidence supporting the trial court's findings came from Hatala herself who conceded that, for a period of approximately two years, her mother took care of her children when she abused alcohol and exercised poor judgment, including several suicide attempts and physical altercations with her husband.

¶18 In addressing the factors found in WIS. STAT. § 767.24(5)[3] to be utilized in making custody determinations, all the relevant factors support the trial

[3] WISCONSIN STAT. § 767.24(5) provides:

767.24 Custody and physical placement.

….

(continued)

(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 parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian. The court shall consider the following factors in making its determination:

(a) The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.

(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.

(cm) The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.

(d) The child's adjustment to the home, school, religion and community.

(dm) The age of the child and the child's developmental and educational needs at different ages.

(e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.

(em) The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.

(f) The availability of public or private child care services.

(fm) The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.

(continued)

court's decision. Evidence was received that the children had an emotional attachment to their grandmother and had emotional problems in their relationship with both Hatala and Manske. A psychological examination completed on the parties indicated that the best interests of the children would be best served by remaining with their grandmother. It was revealed that Hatala's past lifestyle was not conducive to good parenting, as she had attempted suicide and repeatedly abused alcohol. Additionally, the guardian ad litem recommended that the children remain with Lach. The guardian ad litem advised the court that she believed the children were quite well adjusted to the Lach home, their school, their church and the community in which they lived with their grandmother and her husband. The guardian ad litem opined that any disruption would be harmful to the children. Other testimony showed that Hatala was uncooperative in taking the girls to counseling, had failed to meet the girls' medical needs, and, on one

---

> (g) Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party 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. 94019 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.
>
> (jm) The reports of appropriate professionals if admitted into evidence.
>
> (k) Such other factors as the court may in each individual case determine to be relevant.

occasion, she prevented an ambulance from taking one of the children to the hospital when her temperature was over 105°.

¶19 In sum, Hatala was uninvolved with her children, leaving them for long periods of time with her mother. She played no significant role in their education or their spiritual development. Despite the girls' precarious mental health, Hatala did little to help. She also neglected their medical needs by failing to seek treatment and by failing to procure medical insurance, despite its availability.

¶20 While Hatala has constitutional rights to her children, failure to exercise parental responsibilities may result in the forfeiture of those rights. *See* ***Howard M.***, 196 Wis. 2d at 24-25. Here, the trial court acknowledged that Hatala had made great improvements in her conduct and had a renewed concern for her daughters. Nevertheless, the trial court found that to remove the children would drastically affect their well-being. Thus, under the circumstances presented, compelling reasons and the best interests of the children clearly pointed to a grant of custody to their grandmother. We conclude that the trial court properly exercised its discretion.

C. The trial court's reimbursement order was proper.

¶21 Hatala submits that the trial court erred in requiring her to reimburse the Laches for half of the psychological examination costs. Originally the court ordered that Milwaukee County pay for these costs, and the parties would be equally responsible for repayment to the County. The Laches elected to pay all the costs to the psychologist, both those costs assigned to them, and the costs for which Hatala was responsible because, without payment, the psychologist was reluctant to continue on the case. Hatala notes that no one asked them to do so,

and no order was ever entered requiring them to pay her costs. Therefore, she argues that the trial court's order that she reimburse the Laches at the rate of $100 per month with interest accumulating at 12% was improper. As noted in the Laches' brief, however, Hatala neither raised an objection to the trial court's order nor opposed the proposed findings and judgment that provided for the reimbursement of the psychologist's fees paid on her behalf.

¶22 A party may not raise for the first time on appeal a matter which it failed to address before the trial court. ***Allen v. Allen***, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977). Because Hatala failed to object to the reimbursement below, we refuse to entertain her argument on appeal.

¶23 Based upon the foregoing reasons, we affirm the order of the trial court.

By the Court.—Order affirmed.

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