COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP661 **Cir. Ct. No. 2004FA1091**

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

IN RE THE MARRIAGE OF:

KATHERINE LINDA HUST P/K/A KATHERINE LINDA SCHRANK,

PETITIONER-RESPONDENT,

V.

MICHAEL L. SCHRANK,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Michael L. Schrank has appealed from an order denying his motion for modification of physical placement pertaining to his

daughters, Nina and Anna. He also challenges the portion of the trial court's order requiring him to pay guardian ad litem and expert fees related to this post-divorce litigation. We affirm the trial court's order.

¶2 Michael and the respondent, Katherine Linda Hust, were divorced on November 17, 2005, after an eight-day trial. Judgment of divorce was subsequently entered, awarding the parties joint custody of Nina and Anna, who were eleven and seven years old, respectively, at the time. Of each fourteen-day period, Katherine was granted physical placement of nine days, while Michael was granted physical placement of five days.

¶3 On November 26, 2007, just over two years after entry of the divorce judgment, Michael filed a motion to modify placement. The trial court denied his motion on October 16, 2009, after hearing testimony and other evidence presented over the course of approximately nine days. The trial court denied the motion for modification of placement on the ground that Michael had failed to establish a substantial change of circumstances.

¶4 Modification of a physical placement order is directed to the trial court's discretion. ***Keller v. Keller***, 2002 WI App 161, ¶6, 256 Wis. 2d 401, 647 N.W.2d 426. This court will affirm the trial court's discretionary determination if it applied the correct legal standard to the facts of record and reached a reasonable result. ***Id.***

¶5 Because Michael's motion to modify physical placement was filed more than two years after the divorce judgment, it is governed by WIS. STAT.

§ 767.451(1)(b) (2009-10).[1] As a threshold matter, whenever a requested modification would substantially alter the time a parent may spend with his or her child, the moving party must show that there has been a substantial change of circumstances since entry of the last order or judgment substantially affecting placement. Sec. 767.451(1)(b)1.b.; ***Greene v. Hahn***, 2004 WI App 214, ¶22, 277 Wis. 2d 473, 689 N.W.2d 657. If that showing is made, the trial court proceeds to consider whether modification would be in the best interest of the children. WIS. STAT. § 767.451(1)(b)1.a.; ***Greene***, 277 Wis. 2d 473, ¶22. However, where no substantial change of circumstances is shown, the question of the children's best interests is not reached. ***Greene***, 277 Wis. 2d 473, ¶22.

¶6 To have a substantial change of circumstances, the facts on which the prior order was based must differ from the present facts, and the difference must be enough to justify the court's consideration of whether to modify the order. ***Keller***, 256 Wis. 2d 401, ¶7. Whether a substantial change of circumstances has occurred is a mixed question of law and fact. ***Lofthus v. Lofthus***, 2004 WI App 65, ¶17, 270 Wis. 2d 515, 678 N.W.2d 393. "The circuit court's fact finding regarding circumstances 'before,' at the time of the last order substantially affecting placement, and 'after,' at the time of the new motion, and whether when compared these facts constitute a change will not be disturbed unless they are clearly erroneous." ***Id.*** Whether the change is substantial is a question of law that this court reviews de novo. ***Id.*** However, when considering this question, we give weight to the trial court's decision, because that decision is heavily dependent

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

upon an interpretation and analysis of the underlying facts. ***State v. Lucas***, 2006 WI App 112, ¶23, 293 Wis. 2d 781, 718 N.W.2d 184.

¶7 On appeal, Michael contends that the trial court erred in determining that there was no substantial change in circumstances since the time of the parties' divorce. He contends that a substantial change in circumstances was established by evidence of a post-divorce deterioration in the relationship of Anna and Nina and by Anna's weight gain since the time of the divorce. He contends that these changes are contributing to depression and anxiety on the part of Anna, and create the potential for long-term health consequences to her. He contends that Anna would benefit from additional one-on-one time with him, away from her sister, and therefore requests modification of placement to provide for equal placement of Anna, amounting to one extra day per week, as recommended by psychologist Michael Spierer and his associate, Martha Hollis.[2]

¶8 After hearing testimony and argument over the course of nine days, the trial court issued an oral ruling denying Michael's motion. In its decision, the trial court addressed Michael's claims that increased placement with Anna was warranted based upon conflict between the sisters and concerns about Anna's weight. As to the alleged conflict between Nina and Anna, the trial court found that the level of conflict was normal for siblings and did not represent a substantial change of circumstances. It further found that while Anna's weight was a concern, a trend on her part toward being overweight had existed before the

[2] Although Michael's motion for modification of placement requested modification of placement as to both daughters, his arguments on appeal pertain only to the placement of Anna.

divorce. It therefore rejected Michael's claim that evidence of an upward trend in Anna's weight constituted a substantial change in circumstances.[3]

¶9 The trial court's factual findings concerning these matters are not clearly erroneous. We will not detail the lengthy evidence except to note that the trial court's conclusion that Anna had a tendency to weight gain prior to the divorce is supported by the testimony of her pediatrician, Dr. Elizabeth Ciurlak, who also testified that although she was concerned about Anna's weight, it was not a new concern and it did not represent an acute or emergency situation. Under these circumstances, no basis exists to disturb the trial court's determination that changes in Anna's weight did not represent a substantial change of circumstances since the time of the divorce.

¶10 Evidence in the record also supports the trial court's determination that conflict between Anna and Nina did not represent a substantial change of circumstances. The trial court found that their level of conflict was normal for siblings of their ages, and resulted from the fact that they were getting older and had different personalities. The trial court's findings are supported by the testimony and report of Waukesha County Family Court Services (FCS) social worker Robin Kostroski, who was appointed to conduct a physical placement evaluation for the family in December 2007. Kostroski had the opportunity to interview the girls and observe the family relationships over a long period of time, and described the relationship between the girls as "pretty classic," opining that some of their conflicts were "situational, developmental," and likely to dissipate.

[3] The trial court also expressed concern that Michael had pushed the weight issue to build up his case and create a substantial change of circumstances, placing a detrimental and undue strain on Anna.

¶11 In essence, the trial court determined that the type of conflict that occurred between Anna and Nina was a developmentally normal result of aging. The natural aging process of children generally does not represent a substantial change of circumstances. ***Lofthus***, 270 Wis. 2d 515, ¶22. Although aging accompanied by a pattern of adjustment difficulties and harmful behavior may create a substantial change of circumstances, ***Greene***, 277 Wis. 2d 473, ¶25, the trial court could reasonably conclude based upon the totality of the evidence that the conflict in Anna and Nina's relationship was normal and too insignificant to constitute a substantial change of circumstances since the time of the divorce.[4] The trial court's order denying modification of placement is therefore upheld by this court.

¶12 Michael also contends that the trial court erroneously exercised its discretion by requiring him to pay all of the guardian ad litem fees, and the fees of Spierer and Hollis. He contends that in doing so, the trial court ignored its prior order indicating that guardian ad litem fees would be split equally, and ignored a stipulation of the parties, which was approved by the trial court, indicating that they would split Spierer's fees.

¶13 The trial court awarded the fees after determining that the litigation was "extremely protracted" and constituted overtrial on the part of Michael. It did not erroneously exercise its discretion in making these findings and assessing the fees.

[4] The trial court made similar findings in rejecting Michael's argument that conflict between Nina and Katherine represented a substantial change in circumstances. Nothing in the record or Michael's argument on appeal provides a basis for disturbing this determination, nor does Michael appear to be pursuing this claim on appeal.

¶14 A trial court may order either or both parties to pay all or any part of the compensation of the guardian ad litem. WIS. STAT. § 767.407(6). "Overtrial is a doctrine developed in family law cases that may be invoked when one party's unreasonable approach to litigation causes the other party to incur extra and unnecessary fees." ***Zhang v. Yu***, 2001 WI App 267, ¶13, 248 Wis. 2d 913, 637 N.W.2d 754. It may also involve the unnecessary overutilization of judicial resources. ***Id.*** A party's approach to litigation is unreasonable if it results in unnecessarily protracted proceedings. ***Id.*** A trial court may order the payment of fees as a sanction to compensate the overtrial victim for fees unnecessarily incurred or to deter the unnecessary use of judicial resources. *See* ***id.***

¶15 Whether excessive litigation occurred resulting in overtrial is a mixed question of law and fact. ***Id.***, ¶11. Whether excessive litigation occurred is a question of historic fact, and the trial court's findings on the matter will not be reversed unless they are clearly erroneous. ***Id.*** Whether the facts as found constitute unreasonably excessive litigation resulting in overtrial is a question of law. ***Id.***

¶16 This court will not reverse an award of fees for overtrial unless the trial court has erroneously exercised its discretion. ***Id.***, ¶17. We consider whether the trial court has examined the relevant facts, applied the correct standard of law, and come to a conclusion that a reasonable court could reach. ***Id.***

¶17 Applying these standards, we uphold the trial court's assessment of fees. In concluding that overtrial occurred, the trial court found that much of the post-divorce litigation was not about the children, but was instead Michael's way of revisiting the divorce issues to "bash" his ex-wife. It found that Michael used the litigation as a means to vent his anger and grievances, and to prove that he was

the better parent. The trial court considered the length of the litigation and the plethora of motions filed, noting that they were primarily filed by Michael. It concluded that no basis existed for the litigation, and that it needed to send a message to Michael to deter him from subjecting the children to unnecessary and detrimental litigation in the future, and to make clear to him that this type of litigation comes at a substantial price.

¶18 For these reasons, the trial court ordered Michael to pay the guardian ad litem fees and the fees of Spierer and Hollis. In assigning the latter fees to Michael, it found that Spierer and Hollis were appointed because Michael was dissatisfied with the evaluation of Kostroski and the social worker originally assigned by FCS. While acknowledging that Spierer and Hollis supported modifications to the placement schedule, it reiterated that it was not entitled to consider whether modification of placement should occur because Michael failed to establish a substantial change of circumstances.

¶19 The trial court's findings and conclusions are supported by the record related to Michael's motion for modification of placement. The record pertaining to the motion is extraordinarily lengthy, consisting of testimony taken on nine hearing dates, plus lengthy exhibits, multiple motion hearings, and argument. The trial court's conclusion that the litigation was unduly prolonged, and that Michael was primarily responsible for its length, is supported by a review of the record. The trial court's conclusion is also supported by Spierer's testimony that Michael initiated and prolonged the litigation in part for his own psychological purposes, which included maintaining a connection to his ex-wife.

¶20 In affirming the trial court's award of fees, we also reject Michael's argument that the award was precluded by the trial court's prior order regarding

guardian ad litem fees and the parties' stipulation regarding Spierer's fees. Although the trial court stated on July 7, 2009 that the parties would be equally responsible for the guardian ad litem fees, it also stated that the fees were subject to re-allocation and that the matter would be re-addressed in the future.[5] It thus clearly did not intend its order regarding equal division of the guardian ad litem fees to be the final resolution of the matter.

¶21 The parties' stipulation that they would each pay one-half of Spierer's fees also did not preclude the trial court's imposition of the fees as a sanction on Michael. The stipulation was entered in July 2008, more than one year before the conclusion of these proceedings, and before the presentation of most of the testimony and evidence in this case. For the most part, the overtrial therefore occurred after the stipulation as to fees. Because sanctions are appropriate for overtrial, and are designed to protect the interests of the judicial system as well as the individuals involved in the litigation, we conclude that the trial court properly ordered Michael to pay the fees of Spierer and Hollis, despite the stipulation. Contrary to Michael's contention, because the fees were properly ordered as a sanction by the trial court, neither the filing of a motion for relief from the stipulation under WIS. STAT. § 806.07 nor a determination that the

[5] In fact, at the July 7, 2009 hearing, the trial court pointed out that Katherine was seeking dismissal and sanctions, including the payment of the guardian ad litem fees by Michael. It stated that what Katherine was really alleging was overtrial. It stated that it would therefore enter an order making the parties equally responsible for the fees, but that the order would be "subject to the court re-addressing the future allocation of these fees." The trial court thus clearly contemplated re-allocating the guardian ad litem fees if it found that overtrial had occurred.

stipulation violated public policy were required before the trial court could order him to pay the fees.[6]

By the Court.—Order affirmed.

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

[6] In his reply brief, Michael also argues that he was not given adequate notice and an opportunity to be heard on the issue of sanctions. This argument was not raised in his brief-in-chief, and will not be addressed by this court. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (1981) (issues raised for the first time in a reply brief need not be addressed by this court).