COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP423-FT **Cir. Ct. No. 2006FA541**

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

IN RE THE MARRIAGE OF:

KARA JO RUDEK,

JOINT-PETITIONER-APPELLANT,

V.

JEREMIE MICHAEL RUDEK,

JOINT-PETITIONER-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK, III, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Kara Rudek appeals an order awarding primary physical placement of her daughter, Montana, to Montana's father, Jeremie

Rudek.[1] Kara argues the circuit court failed to address the "real controversy" and erroneously exercised its discretion when it awarded primary physical placement to Jeremie. Kara also claims that "substantial factual errors" in the guardian ad litem's written recommendation warrant a new hearing. We reject Kara's arguments and affirm the order.

BACKGROUND

¶2 Kara and Jeremie were divorced in June 2007 and, pursuant to a marital settlement agreement, the couple shared joint custody and equal physical placement of their then one-year-old daughter. During their marriage, the couple moved from the St. Paul, Minnesota area to Somerset, Wisconsin. After their separation, Kara returned to Minnesota and has lived at four different addresses in Inver Grove Heights, including the townhome she currently rents with her long-term boyfriend. Between moves, she has also stayed with her father in Inver Grove Heights, her mother in Newport, Minnesota, and her boyfriend's parents in South St. Paul. After attempts to sell the marital home in Somerset failed, Jeremie remained there, eventually remarried, and had another daughter.

¶3 Before Montana was scheduled to begin kindergarten, the parties could not agree where Montana should attend school. When mediation failed, Kara filed a motion to change legal custody and physical placement and declare which school Montana should attend. A family court commissioner ordered Montana to begin kindergarten in South St. Paul, but did not alter shared placement of the child. Jeremie requested de novo review of the family court

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

commissioner's decision. After a hearing, the court determined the couple's joint legal custody would remain intact with respect to "major decisions." The court, however, awarded primary physical placement to Jeremie, with alternate physical placement to Kara as set forth in the parties' stipulation. This appeal follows.

DISCUSSION

¶4 Physical placement issues are directed to the circuit court's sound discretion. *See* ***Keller v. Keller***, 2002 WI App 161, ¶6, 256 Wis. 2d 401, 647 N.W.2d 426. We affirm the court's discretionary determination when the court applies the correct legal standard to the facts of record and reaches a reasonable result. ***Id.*** In all actions to modify legal custody or physical placement orders, the court shall consider the factors set forth under WIS. STAT. § 767.41(5)(am)[2] to determine the best interest of the child. WIS. STAT. § 767.451(5m).

[2] WISCONSIN STAT. § 767.41(5)(am) provides the following list of factors to be considered by the circuit court in making a custody and physical placement determination:

> 1. 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.
>
> 2. The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
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> 3. 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.
>
> 4. 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.

(continued)

5. The child's adjustment to the home, school, religion and community.

6. The age of the child and the child's developmental and educational needs at different ages.

7. Whether the mental or physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.

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

9. The availability of public or private child care services.

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

11. 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.

12. 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).

12m. Whether any of the following has a criminal record and whether there is evidence that any of the following has engaged in abuse, as defined in s. 813.122(1)(a), of the child or any other child or neglected the child or any other child:

a. A person with whom a parent of the child has a dating relationship, as defined in s. 813.12(1)(ag).

b. A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.

13. Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20(1m) or domestic abuse as defined in s. 813.12(1)(am).

14. Whether either party has or had a significant problem with alcohol or drug abuse.

(continued)

¶5 Citing WIS. STAT. § 752.35, Kara contends the "real controversy" was not fully tried because the court "failed to meet its obligation to determine which school opportunities would better serve the child." We are not persuaded. As the court properly noted, this was not simply a case about which school Montana would attend—it was about where Montana would live. To that end, the court methodically discussed the statutory factors delineated in WIS. STAT. § 767.41(5)(am), including the child's developmental and educational needs, and concluded the parties were virtually equal on most of the factors.

¶6 The court ultimately found in favor of Jeremie, however, noting concerns it had with Kara's credibility. The court recounted that Kara violated the terms of the marital settlement agreement by enrolling Montana in a South St. Paul kindergarten without notifying Jeremie or identifying him to the school on the enrollment form. Based on this omission, the court questioned whether Kara could "comply with the court order and encourage a relationship with [Jeremie]." The court also concluded Jeremie has a good "support system" and is "more likely to communicate with [Kara] and keep her advised what's taking place."

¶7 Kara challenges the court's credibility determination, claiming the court did not give equal weight to lapses in judgment made by both parties. Specifically, although Kara acknowledges her errors with respect to Montana's enrollment in kindergarten, she contends Jeremie was equally culpable for a 2009 decision to unilaterally change Montana's daycare placement. The court as fact

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15. The reports of appropriate professionals if admitted into evidence.

16. Such other factors as the court may in each individual case determine to be relevant.

finder, however, is the ultimate arbiter of witness credibility and of the weight to be given to each witness's testimony. ***Pindel v. Czerniejewski***, 185 Wis. 2d 892, 898, 519 N.W.2d 702 (Ct. App. 1994).

¶8 Kara also argues that "substantial factual errors" in the guardian ad litem's written recommendation warrant a new hearing. Similar to her complaint above, Kara criticizes the GAL's letter for side-stepping "the issue of which school to recommend." Kara also challenges the GAL's statements that by moving away from Somerset despite the couple's shared placement schedule, Kara "created the dilemma the parties are now facing," and it would be easier for Kara, as a renter, to move closer to Somerset.

¶9 Kara's challenges to the GAL's letter are rejected, however, because the subject letter is not part of the record on appeal and was never offered at the hearing. It is the appellant's burden to ensure that the record is sufficient to address the issues raised on appeal. ***Lee v. LIRC***, 202 Wis. 2d 558, 560 n.1, 550 N.W.2d 449 (Ct. App. 1996). The circuit court heard only the GAL's testimony, the significance of which is not specifically argued.

¶10 Because the court, in its discretion, reached a reasonable conclusion supported by the evidence, we affirm the order.

By the Court.—Order affirmed.

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