COURT OF APPEALS
DECISION
DATED AND RELEASED

January 17, 1996

NOTICE

No. 95-1273

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

IN RE THE PATERNITY OF BRADFORD J. B.:

PAUL M. J.,

Petitioner-Respondent,

v.

DORENE A. G.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Dorene A. G. appeals an order expanding her son's placement schedule with his father, Paul M. J. Dorene argues that the trial court misused its discretion because (1) it did not follow the guardian ad litem's recommendation; (2) it erroneously ordered equal physical placement; (3) it relied on improper factors; (4) its decision is not supported by the evidence; and (5) it erroneously rejected psychological testimony. Because the record supports the trial court's exercise of discretion, we affirm.

In February 1990, Paul initiated a paternity action seeking a declaration that Bradford J. B., born to Dorene on December 21, 1989, was his son. The court determined that Paul was Bradford's father, that Dorene be awarded sole custody, that Paul pay 17% of his income as child support and have periods of physical placement.[1] In April of 1993, on Paul's motion, the trial court modified the earlier May 1991 placement schedule. Dorene appealed, contending that under § 767.325(1)(a), STATS., absent allegations of harm to Bradford, the trial court lacked authority to substantially modify placement during the two years following the initial order. We agreed and reversed.

In March of 1995, on Paul's motion, the trial court ordered that due to substantial changes, including Bradford's age and development, it was in Bradford's best interests to modify the May 1991 placement order. Essentially, the trial court maintained the alternate weekends, starting Fridays at 9 a.m. until Sundays at 6 p.m. It alternated Thanksgiving, Christmas Eve, Christmas Day and the Fourth of July. It increased midweek placement to include Tuesday afternoon until Wednesday evening and ordered four weeks during the summer. It further ordered that Bradford spend his birthdays with his mother and spend the day before or after with his father and made other minor adjustments. Dorene appeals.

In determining periods of physical placement, "the court shall consider all facts relevant to the best interests of the child." Section 767.24(5), STATS. Placement determinations are addressed to trial court discretion. ***In re Marriage of Wiederholt,*** 169 Wis.2d 524, 530, 485 N.W.2d 442, 444 (Ct. App. 1992). The trial court misuses its discretion when it applies the wrong legal standards or bases its decision on impermissible factors. ***In re F.E.H.,*** 154 Wis.2d 576, 583, 453 N.W.2d 882, 884 (1990). Underlying an exercise of discretion are issues of fact, that we sustain unless clearly erroneous, giving due deference to the trial court's assessment of weight and credibility of testimony. Section 805.17(2), STATS.

Dorene argues that the trial court misused its discretion because it did not follow the guardian ad litem's recommendation. We disagree. The role

[1] The 1991 placement order required alternate weekend placement from 5 p.m. Friday to 6 p.m. Sunday; Wednesday afternoons for six hours; three weeks vacation; alternate holidays and birthdays and additional times as the parties agree.

of the guardian ad litem is not to direct the trial court's judgment, but to function as an attorney to advocate the child's best interests. Section 767.045(4), STATS. The trial court is not required to adopt the guardian ad litem's recommendation.

Here, the record reveals that the trial court considered the guardian ad litem's recommendation together with other relevant evidence presented at trial, and concluded that additional placement beyond the guardian ad litem's recommendation was warranted. The court's ultimate determination, however, does not appreciably differ from the guardian ad litem's recommendation. The exception is the midweek placement, where the court ordered an overnight instead of an afternoon, and it ordered four weeks in the summer, as opposed to three weeks with two extended weekends. The court did not misuse its discretion.

Next, Dorene argues that the trial court erroneously violated the rule enunciated in ***Westrate v. Westrate,*** 124 Wis.2d 244, 369 N.W.2d 165 (Ct. App. 1985), by ordering approximately equal placement. We disagree. ***Westrate*** held that the trial court cannot order equal placement while rejecting joint custody. "We conclude that equal physical placement is inconsistent with the rights granted by sec. 48.02(12) [STATS.] to the legal custodian. It constitutes alternating physical custody and prevents the creation of a single custodial environment." ***Id.*** at 249, 369 N.W.2d at 168. Here, however, the placement schedule does not create equal placement. Some of the days Bradford spends with Paul are not entire days, but begin in the afternoon and end in the early evening. The effect of the schedule is to give Dorene more than half of Bradford's physical placement. The schedule does not violate ***Westrate***.

Next, Dorene argues that the trial court relied on improper factors. She objects that the trial court characterized its decision as "essentially on the motion filed in April of 1992" that was later reversed and that "[e]xcept for a technicality regarding when the hearing on Mr. Johnson's motion was heard, that order would probably still be in effect." These remarks do not evince a misuse of trial court discretion. The record supports the court's observations that the proceedings are similar and that the reason for the reversal was the two-year statutory limit. The record shows a reasonable exercise of discretion that was not negated simply by making these observations.

Next, Dorene argues that the court's decision is not supported by the evidence because the trial court ignored the rebuttable presumption that the child's current placement is in his best interests. *See* ***Wiederholt,*** 169 Wis.2d at 530, 485 N.W.2d at 444. Dorene argues that Paul failed to submit any evidence whatever that supported the conclusion that a modification was in the best interests of the child. She argues that Paul's primary motivation is his selfish needs and not the needs of the child. She further argues that Paul's rigid and controlling mental and emotional condition cause the placement to be contrary to Bradford's best interests. She also argues that because the parties do not cooperate, Bradford's stability is undermined with expanded placement.

We conclude that the record supports the trial court's exercise of discretion. Doctor Harlan Heinz, Paul's psychologist, testified that he has met with Paul on several occasions and believes that Paul loves his son very much. Heinz opined that Paul is intelligent, emotionally strong and healthy, and that a "father relationship offers a great opportunity to Bradford." He further testified that "Paul has taken extra steps to become skilled as a parent and has made extra efforts to develop parenting skills, and, in my opinion, that offers a healthy environment for Bradford as well." Heinz testified that the promotion of a relationship with the father enhances the child's relationship not only with his father but with his mother as well. Heinz acknowledged that parental communication is a problem in this case and recommended counseling as the best approach. Dorene attacks the weight and credibility of Heinz's and Paul's testimony; however, weight and credibility assessment is a trial court, not appellate function. ***Id***. at 533-34, 485 N.W.2d at 445.

In addition to Heinz's testimony, the trial court received the guardian ad litem's proposed placement schedule that recommended placement with Paul every other weekend, every Tuesday afternoon, every other Thursday afternoon and three weeks in the summer as well as two extended summer weekends. The record supports the determination that it was in Bradford's best interests to develop a relationship with his father as well as his mother and that expanded placement with Paul would promote this goal.

Finally, Dorene argues that the trial court erroneously refused to hear testimony from a psychologist, Allan Hauer. Dorene offered Hauer's testimony that from his experiences and national studies, joint custody is harmful to a child. The trial court excluded the testimony as repetitious and unnecessary. Evidentiary issues are addressed to trial court discretion. ***Wingad***

v. John Deere, 187 Wis.2d 441, 456, 523 N.W.2d 274, 280 (Ct. App. 1994). Because other professionals had already testified about custodial considerations, the court reasonably exercised its discretion. Because the court ultimately denied joint custody, Dorene was not prejudiced by the exclusion of Hauer's testimony in any event.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.