COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP700 **Cir. Ct. No. 2002FA5679**

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

LEEA N. POWER,

PETITIONER-RESPONDENT,

V.

JAMES M. MUHAMMAD,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

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

¶1 CURLEY, J. James M. Muhammad appeals, *pro se*, from the trial court's order denying his motion seeking to enforce the physical placement order incorporated into his divorce judgment. Because the trial court found the

testimony of Muhammad's former wife, Leea Power, more credible than Muhammad's testimony, and this finding is not clearly erroneous, we affirm.[1]

I. BACKGROUND.

¶2 Muhammad and Power were married on March 31, 2001, and divorced in Milwaukee on November 27, 2002. A son, Joshua, was born during the marriage. The marital settlement agreement signed by the parties at the time of the divorce reflects that the parties agreed to have joint legal custody of Joshua with primary placement of the child with Power.[2] In the agreement, the parties stipulated that Muhammad was awarded periods of placement with Joshua on Saturdays between noon and 6 p.m., and one Sunday per month between 1:00 p.m. and 6:00 p.m.

¶3 Approximately one year after the divorce, Muhammad brought a motion to reduce his child support payments and another to enforce the physical placement order. During this same time frame, Muhammad also successfully sought a harassment injunction against Power's boyfriend.[3]

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[1] Power's brief also contains an argument concerning the post-judgment child support hearing. Muhammad has only appealed the trial court's decision to enforce physical placement. Thus, we have not addressed the child support decision.

[2] Although the marital settlement agreement contains a provision calling for joint custody, and the Family Court Commissioner who presided over the divorce hearing stated that the parties agreed to joint custody, the divorce findings of fact read that "the best interests of the child are served by awarding sole legal custody to the petitioner." However, the question of whether there is joint or sole custody is not in dispute.

[3] One week after the harassment injunction was entered, Power filed a request for a domestic abuse injunction against Muhammad. Power's request was denied.

¶4 With respect to the motion seeking to enforce the physical placement order, the trial court held a hearing on December 9, 2003, at which time both Muhammad and Power testified. At the conclusion of the hearing, the trial court found that Power was more credible than Muhammad, and consequently found that Muhammad failed to give Power adequate notice when he attempted to exercise his physical placement rights with his son.

¶5 The trial court then addressed the issue of how much prior notice Muhammad should give Power when he wished to exercise his physical placement rights. The trial court ordered that Muhammad must give Power forty-eight hours notice, and that this notice was to be given by calling Power's cell phone. The trial court also ordered Power to wait one hour for Muhammad to appear when Muhammad had scheduled visitation before making other plans. Following these orders, the trial court directed Power's attorney to prepare a stipulation for the parties' signatures. The trial court said:

> All right. So her attorney is going to prepare that by way of a stipulation. He is going to mail it to you. I want you to read it over. If it is agreeable, I want you to sign it and he will present it to me. And I will sign an order and both of you will get a copy of that….

Following the hearing, after receiving no correspondence from Power's attorney, Muhammad twice wrote to the court. Finally in January 2004, Power's attorney handed Muhammad a stipulation at the child support hearing held on Muhammad's request to reduce his child support. Power's attorney then wrote a letter to the trial court explaining the delay in getting the stipulation prepared, and why he served a copy of the stipulation on Muhammad at the child support hearing. No copy of this letter was sent to Muhammad. Muhammad also wrote to the trial court complaining about the delay in exercising his physical placement

caused by his former wife's attorney's failure to timely send him the stipulation. In the letter, Muhammad objected to the form and substance of the proposed stipulation, and advised the court that he would not be signing the stipulation. Following this, the trial court signed the order attached to the proposed stipulation, striking out the words "[s]tipulation and upon all the files." Muhammad appeals.

II. ANALYSIS.

¶6 Muhammad complains that the trial court erroneously exercised its discretion in denying his motion to enforce his physical placement rights for the following reasons: (1) the trial court failed to "make adequate findings of fact"; (2) the trial court refused to permit Muhammad to make an offer of proof regarding a tape Muhammad wanted admitted in the record; and (3) the trial court failed to consider the best interest of the child in making its decision.[4]

¶7 The procedure and underpinnings required for filing a post judgment motion to enforce physical placement orders are set forth in WIS. STAT. § 767.242 (2003-04).[5] Muhammad complied with the statutory directives by properly commencing the motion and personally serving Power with a copy. The trial court then held a hearing as directed by the statute. At it, Muhammad testified that his former wife refused his requests to have physical placement with his son and often refused to speak to him. He also testified that when he called to request physical placement, his former wife's boyfriend would often threaten him. Power testified

[4] Muhammad also submits that Power has not abided by the revised order. That issue should be addressed to the trial court.

[5] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

that she never blocked Muhammad from having physical placement. She claimed that she encouraged Muhammad to spend time with their son and she even allowed Muhammad to visit in her home because Muhammad had no appropriate living quarters. At the close of the hearing, the trial court concluded that Power's version of the events was more credible than Muhammad's.

¶8 In situations where the appellate court is asked to review the trial court's evaluation of the credibility of a witness and the weight that the trial court afforded each witness, the appropriate standard of review is whether the findings of fact made by the trial court are clearly erroneous. *See* ***Tourtillott v. Ormson Corp.***, 190 Wis. 2d 291, 294-95, 526 N.W.2d 515 (Ct. App. 1994). Under the clearly erroneous standard of review, "even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding." ***Reusch v. Roob***, 2000 WI App 76, ¶8, 234 Wis. 2d 270, 610 N.W.2d 168. "[W]hen the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983) (citation omitted). Using this standard, we are satisfied that the trial court's findings are not clearly erroneous.

¶9 As noted, Muhammad testified that Power refused to follow the agreement that was incorporated into the divorce judgment. He testified that he had been hampered by Power in his recent requests to visit with his son and he had been forced to obtain a harassment injunction against Power's boyfriend because of the boyfriend's threats to Muhammad when he called Power in order to

schedule a visit. On the other hand, Power claimed that Muhammad was inconsistent in his requests to exercise his physical placement with the child and that she had even allowed Muhammad to visit in her home to accommodate him. The trial court determined that Power had not denied Muhammad his physical placement of the child and that instead, Muhammad had not given Power adequate notice.

¶10 Unlike the trial court, we have not had the opportunity to see or hear the witnesses. Thus, deciding whether Muhammad or Power was more truthful is a decision better left to the trial court. Since a reasonable person could well have believed Power's version over Muhammad's, we cannot conclude that the trial court's evaluation of the parties' testimony was clearly erroneous.

¶11 Next, Muhammad argues that the trial court erroneously exercised its discretion when it refused his offer of proof. Muhammad wished to have the trial court hear a tape of the boyfriend's threats to Muhammad. Admission or rejection of evidence lies within the sound discretion of the trial court. *See* ***State v. Keith***, 216 Wis. 2d 61, 68, 573 N.W.2d 888 (Ct. App. 1997). We will not disturb an evidentiary ruling when the court, in making its ruling, has exercised discretion in accordance with accepted legal standards and the facts of record. ***State v. Clark***, 179 Wis. 2d 484, 490, 507 N.W.2d 172 (Ct. App. 1993). Stated another way, "[w]e will not reverse a discretionary determination ... if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). "The court's discretionary determinations are not tested by some subjective standard, or even by our own sense of what might be a 'right' or 'wrong' decision in the case, but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the

same conclusion." ***State v. Jeske***, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). And, if we conclude that the court has failed to adequately explain the reasons for its decision, we will independently review the record to determine whether it provides a reasonable basis for the ruling. ***State v. Rushing***, 197 Wis. 2d 631, 645, 541 N.W.2d 155 (Ct. App. 1995).

¶12 Our review of the record convinces us that the trial court properly exercised its discretion in declining to listen to the tape. During Muhammad's testimony, the following exchange occurred:

> [THE DEFENDANT:] … If the Court would entertain, I do have the tape of that threat that was made on my life.
>
> [THE COURT:] Well, let's focus specifically on your allegation. However, you maintain that Ms. Power has not made your son available and has not complied with the placement order; is that correct?
>
> [THE DEFENDANT:] Correct.

While Muhammad offered to have the court listen to a threat made to Muhammad by the boyfriend, Muhammad had already advised the court that the threats resulted in a harassment injunction against Power's boyfriend. Thus, the issue of whether the threats actually occurred had already been decided. The tape itself was irrelevant to the issue before the court—whether Power prevented Muhammad from exercising his right to see his son. Although not specifically stated, the trial court had obviously determined that the tape had little relevancy to the controversy before it. Further, making arrangements to hear the tape would, presumably, have been time-consuming. For those reasons, the trial court's refusal to hear the tape was a proper exercise of discretion.

¶13 Finally, Muhammad argues that the trial court failed to take into consideration the best interest of his child in its decision. While the best interest

of the child is a dominant factor in deciding custody and placement disputes, *see* WIS. STAT. § 767.24(5), here, the issue was whether Power was interfering with physical placement provisions already in place. In such a circumstance, the best interest of the child plays a minor role. Indeed, WIS. STAT. § 767.242, concerning enforcement of physical placement orders, does not mention the best interest of a child. The trial court ultimately decided that Power did not interfere with Muhammad's physical placement rights. The trial court need not make a finding concerning the best interest of the child in an enforcement hearing when the trial court decides that no interference has been proven. Besides, implicit in the trial court's order requiring Muhammad to give forty-eight hours notice to Power when Muhammad wanted physical placement with his son was that this new order would serve the best interest of Joshua by reducing the rancor between his parents and permitting a tumultuous-free exchange of the child.[6] For the reasons stated, the trial court is affirmed.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[6] While we note the irony in the fact that in pursuing his physical placement rights Muhammad has ended up with a far more restrictive physical placement order than had originally been in place, we are nevertheless satisfied that under our required preferential standard of review the trial court did not erroneously exercise its discretion in denying Muhammad's motion.