COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2939

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

IN RE THE MARRIAGE OF:

KAREN A. LLOYD,

PETITIONER-RESPONDENT,

v.

DANIEL J. LLOYD,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Daniel Lloyd appeals from an order denying his request to modify the parties' physical placement schedule. He claims that the trial court erroneously exercised its discretion when it determined that he had

failed to show that a substantial change in circumstances and the best interests of the children warranted a change in periods of physical placement. We conclude that the trial court properly determined that the evidence did not support a substantial change in primary physical placement, but that the trial court should have addressed the issue of what, if any, replacement hours were warranted. Therefore, we affirm in part, reverse in part, and remand for a determination in accord with this opinion.

BACKGROUND

At the time of their divorce, the parties stipulated that Karen Gillitzer (f/k/a Karen Lloyd) would have primary physical placement of their two minor children, and Lloyd would have periods of physical placement every other weekend and during the day on Tuesdays and Thursdays. The stipulation was based on Lloyd's working the second shift. However, when Lloyd changed jobs after the divorce, he was no longer available to take advantage of his weekday placement times.

Gillitzer at first informally agreed to let Lloyd have the children on Tuesday and Thursday evenings. However, she eventually withdrew her consent to Tuesday and Thursday evening placement. She offered Wednesday evening placement instead, but Lloyd declined the offer and moved to modify the divorce judgment, more than two years after its entry.

Lloyd's initial motion requested placement from Wednesday evening to Friday morning on those weekends when he did not have placement and from Wednesday evening to Sunday evening when it was his weekend for placement. However, he later amended his motion to add requests for either primary physical placement or alternating weeks of placement. Gillitzer agreed

that some adjustment of placement would be appropriate in light of Lloyd's altered work schedule. She again offered Wednesday evening placement, but challenged any change in primary physical placement. The guardian ad litem also agreed that it would be in the best interests of the children to have more than four nights of contact with their father each month, but disagreed that it would be in their best interests to change the primary physical placement. She recommended that Lloyd be given placement from Wednesday evening to Thursday morning, on those weeks when he also had weekend placement, and from Wednesday evening until Friday morning, on those weeks when he did not have weekend placement.

Mediation failed and the matter was tried to the court on August 20, 1998. Lloyd presented two witnesses: Gillitzer and her mother. The vast majority of their testimony centered on two subjects — Gillitzer's placement of the children with a babysitter rather than their father during a trip she took to Las Vegas, and Gillitzer's strained relationship with her parents. Gillitzer admitted that Lloyd was a good father; that she had no problem with allowing him some additional time with the children; and that she would accept the guardian ad litem's proposed placement.

After Lloyd rested, Gillitzer moved to dismiss the motion for modification on the grounds that Lloyd had failed to present clear and convincing evidence that a change in placement was warranted. The trial court granted the motion, although it indicated that it would consider reopening the hearing if the parties attended counseling.

STANDARD OF REVIEW

The modification of a physical placement schedule lies within the discretion of the trial court. ***Wiederholt v. Fischer***, 169 Wis.2d 524, 530, 485 N.W.2d 442, 444 (Ct. App. 1992). Therefore, we will affirm a determination on placement modification so long as it represents a rational decision based on the application of the correct legal standards to the facts of record.

ANALYSIS

The trial court has authority to modify a physical placement order which has been in effect for more than two years when there has been a substantial change of circumstances affecting the best interests of the children. Section 767.325(1)(b)1, STATS. A "substantial change of circumstances" means "that the facts on which the prior order was based differ from the present facts, and the difference is enough to justify the court's considering whether to modify the order." ***Licary v. Licary***, 168 Wis.2d 686, 692, 484 N.W.2d 371, 374 (Ct. App. 1992).

There is a rebuttable presumption that it is in the children's best interests to continue primary physical placement with the parent with whom the children reside for the greater period of time. Section 767.325(1)(b)2, STATS. This presumption may be overcome by a preponderance of the evidence. Section 903.01, STATS. Additionally, the trial court may modify a placement order without substantially altering the amount of time each parent has with the children when it would be in the children's best interests to do so. Section 767.325(3).

As a threshold matter, we note that Lloyd never argued to either the trial court or this court that his alternate request to replace his lost weekday

placement times with other weekday times was not a "substantial" change and thus not subject to the "substantial change in circumstances" test and the accompanying rebuttable presumption against a change in primary physical placement. Nor has Lloyd challenged the trial court's apparent use of a clear and convincing standard to overcome the presumption in favor of continuing the current placement. Because Lloyd never challenged the application of § 767.325(1)(b)1, STATS., to his request for replacement time or disputed the quantum of proof required to overcome the presumption of § 767.325(1)(b)2, we will not directly address either of these issues. *See* ***Preuss v. Preuss***, 195 Wis.2d 95, 105, 536 N.W.2d 101, 105 (Ct. App. 1995) (issues not raised before the trial court are waived). Instead, we will limit our analysis to the specific arguments which Lloyd raises in his appellate briefs. *See* ***Goossen v. Estate of Standaert***, 189 Wis.2d 237, 252, 525 N.W.2d 314, 320 (Ct. App. 1994) (we need only address arguments which are developed on appeal).

Lloyd first argues that the trial court's decision was based on a clearly erroneous finding that there had been no substantial change in circumstances. However, the trial court specifically declined to make such a finding in its written order, and a review of the transcript shows that its decision was based primarily on Lloyd's failure to show that increasing Lloyd's periods of physical placement would be in the best interests of the children.

We agree with the trial court's conclusion that Lloyd failed to present sufficient evidence to warrant a change in primary physical placement. As the court noted, the fact that Gillitzer was not getting along with her mother was irrelevant. The focus for the best interest analysis should have been on how the children were fairing under primary physical placement with their mother, and Lloyd did not present any psychological or other testimony that they were

maladjusted. To the contrary, the guardian ad litem's report indicated that the children were both doing well in school and interacted well with their peers.[1] While there was testimony that the older child had been experiencing some lightheadedness which might have been stress related, the guardian ad litem opined that both parents were causing stress for the children through their failures to communicate. The trial court's finding that there was nothing to show that the children's stress levels were out of the ordinary is supported by the record. In short, Lloyd did not present sufficient evidence, to overcome the presumption that continued primary placement with Gillitzer would be in the children's best interest.

When Lloyd pointed out that the trial court's ruling would leave him with only four nights per month with the children, contrary to the guardian ad litem's proposal, the trial court observed:

> THE COURT: Well, you could have had that proposal this morning without us doing anything. You didn't want it. That doesn't change the fact that you have not met your burden of proof on the motion.

However, Lloyd's amended motion, which set forth his request for primary physical placement or alternating weeks, also "renew[ed] the additional requests for relief set forth [in his initial motion]," namely alternating Wednesday and Thursday overnight placement with Wednesday, Thursday and Friday overnight placement. On the stand, Gillitzer agreed to the guardian ad litem's recommendation of alternating Wednesday overnights with Wednesday and

[1] Gillitzer contends that the guardian ad litem's report was not part of the record, and requests that we sanction Lloyd for referring to it. However, our review of the record shows that the report was properly before the trial court, and Gillitzer did not object to the trial court's many references to it.

Thursday overnights. Thus, the issue of replacement hours was squarely before the court, and it appears undisputed by the parties and the guardian ad litem that some relief of this nature would have been in the best interests of the children.

Because the trial court appears to have declined to address Lloyd's alternate request for relief, we remand to allow it to do so. On remand, the trial court may hold a further hearing or it may address the issue of replacement hours on the record before it.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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