COURT OF APPEALS DECISION DATED AND FILED

May 24, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2928

Cir. Ct. No. 1996FA56

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE MARRIAGE OF:

JOSEPH E. BEJCEK,

PETITIONER-RESPONDENT,

V.

ANN M. BEJCEK, N/K/A ANN M. OIKARI,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. This matter arises from a post-divorce custody proceeding. Ann Oikari appeals an order denying her motion to modify placement

on the ground that no substantial change in circumstances occurred as a matter of law. Oikari argues that the trial court erroneously denied her motion summarily without engaging in a fact-finding process. Because Oikari is entitled to an evidentiary hearing, we reverse the order and remand for further proceedings.

Background

¶2 Oikari and her former husband, Joseph Bejcek, were divorced in 1997.[1] Oikari was awarded primary placement of the parties' children.[2] In April 1999, Oikari moved from Wisconsin to Minnesota. The divorce judgment was amended, transferring primary placement to Bejcek. In 2004, after Bejcek brought proceedings to move with the children to Florida, Oikari sought to have placement transferred to her.

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[1] The parties' briefs do not provide adequate record citation. Although occasionally citing to the record, numerous fact statements are unaccompanied by any record citation or accompanied only by general citation to documents in the appendix. Failure to include page citations and citations to the clerk of court's pagination violates the WIS. STAT. RULE 809.19(1) requirement that fact assertions must be accompanied by appropriate record citation. Rules of appellate procedure are designed to assist appellate review of the parties' issues.

The parties are reminded that an appellate court has no duty to sift through the record to find support for fact assertions. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. Failure to comply with the rules of procedure may be subject to sanction. WIS. STAT. RULE 809.83. We suggest counsel refer to Michael S. Heffernan, *Wisconsin Appellate Practice & Procedure* § 11.13, Facts (3d ed. 2002), which provides guidance. It states: "When citing the record, be sure to follow the pagination supplied by the clerk of circuit court. If, for example, the transcript is designated as document '10,' a cite to page 13 of the transcript should read 'R.10 p. 13.' When citing items in an appendix, cite to both the record and the appendix."

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

[2] While the parties have four children, this custody proceeding involves the three younger ones, who were ages fourteen, twelve and eleven at the time of the modification hearing.

¶3 Bejcek withdrew his motion and Oikari proceeded on her motion. A guardian ad litem was appointed and filed a report. The report summarized that while the children report "many negative things" about their father,

> I believe [Bejcek] has done an excellent job in raising these children and providing them with social, academic, and athletic opportunities. The children are well adjusted and exceptional students. The negative things they report about their father, I believe are somewhat exaggerated. However, the fact that they are reporting their items as support for their desire to live with their mother, certainly shows their resolve and conviction to move to Minnesota. They have considered the effects of a change in schools, change in friends, starting over in athletic programs, and adapting to a new community. Therefore, I believe the most significant factors in my recommendation are the age and maturity of the children and their wishes.

The guardian ad litem's report recommended transferring the children's placement to Oikari.[3]

¶4 At the modification hearing, the trial court inquired as to the alleged change of circumstances. In response, Oikari's attorney stated: "[T]he parties now have remarried and the dynamics in the care of the children has changed and their position as to where they want to live has changed and their ages have changed."

¶5 The guardian ad litem also responded, stating the children "did indicate to me a change in their wishes to now reside with their mother." He added the children "are doing well at their current location, and my recommendation was based, you know, almost exclusively on the wishes of the children, their age, their what I call level of maturity." The guardian ad litem

[3] The record indicates that the guardian ad litem report was accepted to supplement Oikari's offer of proof.

explained that because of their ages, "I believe that their wishes should carry substantial weight in making a placement determination." He concluded there was a substantial change "because of their change in their wishes, their change in their desire to live with their mother, and their advanced level of maturity and their age[s]."

¶6 In response to the court's request to make a "brief but specific offer of proof" as to what evidence he would offer to show a change of circumstances, Oikari's counsel responded he would offer evidence regarding the parties' remarriages, the circumstances of Oikari's home and family, that the children have matured, that they strongly wish to live with their mother and,

> we feel that all of those are situations that did not exist at the time and have created a situation that cry for a change in circumstances as we know when children, particularly women, start to mature they have some special needs and requirements that are different than they were when they were ten as opposed to 14, and they are actually issues in this case, your Honor.

¶7 The circuit court characterized Oikari's offer of proof as essentially that "the children wish to have their placement changed. Is that not a fair summary?" Oikari's counsel responded that the children's maturity and changing needs were important factors and, therefore, the basis of the motion was broader than merely the children's changed wishes.

¶8 The court questioned whether the basis of Oikari's motion constituted a substantial change in circumstances, explaining:

> I don't know … that simply and solely the wishes of a child, whatever the child's age, would ever constitute what I would consider to be a substantial change in circumstances. … I am unaware of any case that supports that proposition that the wishes of a child constitute a change in circumstances sufficient to allow the court to

> reexamine custody, and I would be very loathe to make a determination that simply the wishes of the child constitute a sufficient change of circumstances to allow parties to relitigate custody because children, being children, are subject to changing attitudes, changing positions, or subject to manipulation.
>
> [It] is one factor, among many, and it is one factor in particular that I think I would be very hesitant to hang my hat on as a substantial change in circumstances.

¶9 The court observed that the "real basis for the motion" was Bejcek's proposed move to Florida, "but now that that's gone away you are not convincing me that there is any basis on that offer of proof that you gave me for determining there is a change in circumstances." The court added, "the fact of [Oikari's] remarriage is neither here nor there unless that can be shown to have some direct impact upon the circumstances." The court concluded that "wishes of the children by themselves even coupled with the remarriage of one party is simply not a substantial change in circumstances … that would justify the Court changing around the custody."

¶10 Oikari's counsel pointed out that the children had reasons for their changed desires, as noted in the guardian ad litem's report, including Bejcek's drinking and driving with them, his physical discipline of them,[4] his interference with their privacy,[5] and that their relationship with their father has changed in nature.

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[4] The court noted, "The children have reported instances where [Bejcek] has gotten physical with the boys" and "I don't believe these instances rose to the level of child abuse and that they were done in response to the boys misbehaving." The court also found that there was no report of Bejcek being drunk, abusive or jeopardizing the children's safety while driving.

[5] The report indicated that the children objected to their father listening in on telephone conversations and reading part of a diary.

¶11 The court ruled that Oikari's "expanded offer of proof" showed normal family discord, "at least normal family discord in a family that has been divorced where the parents don't get along and don't support each other … and that still comes through that there is hostility and lack of cooperation between the two of them." Based on the offer of proof, the court ruled it would not take testimony, because

> I see nothing in the record that would allow me to or at least would be a basis upon which I would be willing to disturb the status quo even if all these proofs came in. I do not believe that they would constitute the kind of substantial change that is necessary, and therefore, I don't want to put the parties to the time and trouble of setting out that evidence; and I also am not unmindful of the fact that if I let them put on their respective sets of evidence today that's going to further damage the relationship between them and further be a source of discord and upset for the children.

¶12 The court concluded that "assuming the truth of the things that were set forth in the offer of proof without even knowing what's on the other side to rebut those allegations, the children would rather be with their mother for reasons that I don't consider to be controlling or substantially impinging upon their best interest." The court denied Oikari's motion.

Legal Standard

¶13 WISCONSIN STAT. § 767.325 governs the revision of legal custody and physical placement orders. Because Oikari's motion was filed more than two years after the initial custody decree, para. (1)(b) applies. It states:

> (b) *After 2-year period.*
>
> 1. Except as provided under par. (a) and sub. (2), upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:
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> a. The modification is in the best interest of the child.
>
> b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.
>
> 2. With respect to subd. 1., there is a rebuttable presumption that:
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> a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.
>
> b. Continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.
>
> 3. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under subd. 1.

¶14 Whether there is a substantial change in circumstances is a mixed question of law and fact. ***Palmersheim v. Palmersheim***, 2004 WI App 126, ¶8, 275 Wis. 2d 311, 685 N.W.2d 546. The circuit court's findings of fact regarding an alleged change of circumstance since the last custody and placement order will not be disturbed unless clearly erroneous. ***Id.*** However, whether a substantial change in circumstances has occurred is a question of law. Because the circuit court's legal determination is mixed with its factual findings, we give weight to the circuit court's decision. ***Id.***

Discussion

¶15 Oikari argues that the court erred when it concluded that no substantial change occurred. Oikari contends: "From the time of the original divorce decree, the children have gone from not being beaten to being beaten, physically, emotionally, and psychologically; and the wishes of the children have gone from ambivalent to strongly opposed to continu[ing] to live with [Bejcek]." We conclude that Oikari overstates her offer of proof. Her offer of proof does not necessarily lead to a finding that the children were "beaten, physically, emotionally, and psychologically." Nonetheless, we are satisfied that allegations contained in the record, if true, may support a finding of a substantial change in circumstances and, therefore, require an evidentiary hearing.

¶16 Based on Oikari's offer of proof, the court concluded the allegations, if true, demonstrated no substantial change in circumstances to support a transfer of placement. Nonetheless, the court's decision indicates that while accepting the allegations as true, it weighed and interpreted the evidence. For example, the court considered reasons the children gave to support their changed desire with respect to placement. These reasons were contained in the guardian ad litem's report, where the children disclosed instances that "include slapping the boys, hitting [one] with a broom, and pushing [another] against a basketball post." The guardian ad litem concluded that while the incidents "left no visible injuries and were done in response to the boys misbehaving," it was inappropriate to use physical discipline with the children ages fourteen, twelve and eleven. Based on the written guardian ad litem report, the court found that "the children have reported instances where [Bejcek] has gotten physical with the boys" and "I don't believe these instances rose to the level of child abuse and that they were done in response to the boys misbehaving."

¶17 Also, the guardian ad litem reported that the children stated their father "drinks alcohol on a regular basis," having two or three drinks almost every day. They have also reported that they observed Bejcek drinking while driving, but "have not reported any instances of [Bejcek] being drunk, abusive, or jeopardizing their safety while drinking." Thus, the guardian ad litem did not believe Bejcek's alcohol consumption "arises to the level of alcohol abuse." Based on the guardian ad litem's determination, the court found that there was no report of Bejcek being drunk, abusive or jeopardizing the children's safety while driving.

¶18 The guardian ad litem also stated that the children's age and maturity were "significant factors" in his preliminary recommendation that primary placement be transferred to Oikari. Nonetheless, the court did not give weight to this portion of the guardian ad litem's recommendation, indicating that children's ages and desires were not sufficient to demonstrate change.

¶19 We appreciate the trial court's opportunity to observe the dynamics of the parties' relationships and its ability to gain insights. The trial court's unique position as fact-finder and ultimate arbiter of the weight and credibility of evidence presupposes our deferential review of its findings. *See* ***Estate of Dejmal***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Here, however, the court's decision indicates that it circumvented fact-finding to reach the legal question whether Oikari's offer of proof supported a substantial change in circumstances under WIS. STAT. § 767.325.

¶20 While the question of a substantial change in circumstances presents a legal issue, it is heavily dependent on fact-finding:

> The term "substantial change of circumstances" is well known in family law. It focuses on the facts. It compares the facts then and now. It requires 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 (Ct. App. 1992).

¶21 Here, the court concluded that upon undisputed facts, the differences alleged between the facts then and the facts now were insufficient to consider whether to modify the placement order. However, while no facts were admitted to controvert Oikari's offer of proof, it cannot be characterized as offering undisputed facts. The facts alleged gave rise to conflicting inferences. For example, the children's changed preference may have been the result, as the court suggested, of adolescent restlessness, to which the court accorded little weight. On the other hand, the children's changed preference may have been a result, as Oikari claimed, of their changed ability to cope with a family dynamic that included physical discipline and an alcohol-infused living environment, which may be entitled to additional weight. *See* ***Haugen v. Haugen***, 82 Wis. 2d 411, 417, 262 N.W.2d 769 (1978) (Child's "personal preference … not be deemed controlling … unless the child gives substantial reasons.") Without resolving conflicting inferences, the offer of proof does not support the court's ultimate legal conclusion of no substantial change in circumstances. In any event, the court's findings indicate that it weighed and interpreted Oikari's offer of proof to resolve conflicting inferences without characterizing its process as fact-finding.[6]

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[6] In the case of ***Kress Packing Co. v. Kottwitz***, 61 Wis. 2d 175, 178-79, 212 N.W.2d 97 (1973), while in a different context, Chief Justice Hallows made the following observations:

(continued)

¶22 Bejcek argues, nonetheless, that previous custody orders are essentially silent with respect to the children's previous preferences and, therefore, no comparison is possible. We disagree. The guardian ad litem responded to the court's questioning to the effect that the children's preferences represent a change from earlier custody proceedings. Thus, the record is not silent, contrary to Bejcek's suggestion.

¶23 Bejcek further argues that the children's preferences are never controlling and should not be considered unless accompanied by substantial reasons. He points out that the guardian ad litem characterized the children's complaints as "exaggerated" and that the children's perceptions that the grass will be greener on the other side of the fence is no basis for a change of custody. While Bejcek's arguments provide reasons not to modify placement, they fail to provide a rationale for denying an evidentiary hearing to determine the facts.

¶24 We conclude that the facts alleged regarding the children's greater maturity, their changed preferences, and their concerns regarding Bejcek's use of physical discipline and alcohol require greater development than afforded by the

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> [W]hen undisputed facts permit the drawing of different inferences, the drawing of one such permissible inference of fact is an act of fact finding and the inference so derived constitutes an ultimate fact upon which a conclusion of law may rest….
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> … A conclusion of law goes farther and accepts the facts, ultimate and evidentiary, and by judicial reasoning results from the application of rules or concepts of law to those facts, whether the facts are undisputed or not. An ultimate fact may be found as a matter of law, but such process does not change its factual nature to a conclusion of law because of the method by which it was arrived at. "As a matter of law" merely means no other factual finding could be reasonably drawn from the evidentiary facts.

offer of proof process utilized by the trial court. While a developed record and the court's assessment of weight and credibility may ultimately lead it to an identical conclusion, its legal conclusion must rest on facts properly found. Thus, we reverse the order and remand for an evidentiary hearing on Oikari's motion to modify placement.

By the Court.—Order reversed and cause remanded with directions.

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