

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 10, 2006

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. 2005AP2562

Cir. Ct. No. 2000FA186

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE SUPPORT OF D. J. W.:

NICOLE B. WOLLENZIEN,

PETITIONER-RESPONDENT,

v.

BRAD A. RUDESILL,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County:
PATRICK M. BRADY, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 PER CURIAM. Brad Rudesill appeals a judgment denying his motion to change the placement of his son, Dalyn. Rudesill argues that because

there was no prior order entered regarding Dalyn's placement, the trial court erred by requiring him to first prove a substantial change of circumstances under WIS. STAT. § 767.325(1)(b).¹ Rudesill alternatively argues the trial court erroneously exercised its discretion by denying his motion because he had proven a substantial change in circumstances. Because Rudesill was not required to first prove a change in circumstances, the judgment is reversed and the matter is remanded for further proceedings.

BACKGROUND

¶2 Brad Rudesill and Nicole Wollenzien are the parents of Dalyn, who since birth has lived primarily with Wollenzien in and around Shawano. Dalyn lived with his mother based on a stipulation the parents entered into at the time child support was established. Around January 1, 2004, Wollenzien and Dalyn moved from Shawano to Green Bay. The distance between Green Bay and Shawano is about thirty-eight miles or a forty-minute drive.

¶3 Following this move, Rudesill brought a motion to alter Dalyn's placement. Rudesill asked for primary placement if Wollenzien moved to Green Bay. Alternatively, if Wollenzien remained in Shawano, Rudesill requested equal physical placement of their son. Rudesill made his motion on the belief that the move to Green Bay would adversely affect his relationship with his son.

¶4 At the hearing on the motion, one of Dalyn's teachers testified about her impressions of Dalyn. Rudesill and Wally Wollenzien, Dalyn's maternal

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

grandfather, also testified about the current placement. After this testimony, the court noted it would entertain a motion to dismiss. Wollenzien moved to dismiss on the grounds that there was not a substantial change in circumstances. Rudesill filed a supplemental affidavit arguing there was a substantial change in circumstances that necessitated the change in placement.

¶5 On June 14, 2005, the circuit court granted the motion to dismiss concluding such a short move to Green Bay was no substantial change of circumstances. Rudesill and Wollenzien then entered into another agreement regarding Dalyn's placement that left the placement essentially unchanged.

DISCUSSION

¶6 Rudesill argues that the circuit court erroneously exercised its discretion by concluding there was no substantial change in circumstances and that the court should not have required him to first prove the change. We agree with Rudesill that because there was no prior placement order, the circuit court should not have granted a motion to dismiss on the basis of his failure to prove changed circumstances.

¶7 The interpretation of statutory language and its application to specific facts are questions of law we decide de novo. *Garcia v. Mazda Motor of Am., Inc.*, 2004 WI 93, ¶7, 273 Wis. 2d 612, 682 N.W.2d 365. WISCONSIN STAT. § 767.325(1)(b) only applies to alterations of placement where an order of legal custody or an order of physical placement has been in effect for at least two years. Wollenzien argues the child support order she signed as the custodial parent is sufficient to require the application of § 767.325(1)(b). Wollenzien's reading of this statutory section is too broad. Section 767.325(1) cannot be read to include any order that might contain references to the types of placement if placement was

not an underlying determination of the court. Furthermore, the legislature recently enacted legislation that has clarified this issue.² 2005 Wis. Act 443 § 160. The legislature noted that “initial order” in part (a) of § 767.325(1) refers to the final judgment determining legal custody or physical placement and that no change in substantive law is intended. *Id.* Thus, our reasoning is consistent with the legislature’s intent that the order referred to in § 767.325 must be one determining custody or placement.

¶8 Here, there is no order by a court determining legal custody or physical placement. Rather, there is only a stipulation by the parties as to where

² The Legislature recently renumbered this section and added language to § 1(a) that relates to § 1(b). *See* 2005 Wis. Act 443, § 160. The new statutory section is 767.451(1)(b).

WISCONSIN STAT. § 767.325(1)(b) reads as follows:

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:

- 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. (Emphasis added.)

WISCONSIN STAT. § 767.451 will read, in part, as follows:

(1)(a) Within 2 years after *final judgment*. Except as provided under sub. (2), a court may not modify any of the following orders before 2 years after the *final judgment determining legal custody or physical placement* is entered under §767.41, unless a party seeking the modification, upon petition, motion, or order to show cause, shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child[.] (Changes italicized.)

Dalyn will reside. Because WIS. STAT. § 767.325(1)(b) does not apply to the facts of this case, and we need not decide whether there was a change of circumstances, the judgment is reversed and the matter remanded to the circuit court for further proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

