COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2010

A. John Voelker
Acting 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. 2010AP1791-FT **Cir. Ct. No. 2005FA334**

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

IN RE THE MARRIAGE OF:

DALE T. SCHMIT,

JOINT-PETITIONER-APPELLANT,

V.

HEIDI L. SCHMIT,

JOINT-PETITIONER-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed and cause remanded with directions*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dale Schmit appeals from an order dismissing his motion for modification of physical placement.[1] The circuit court determined Schmit failed to establish a substantial change in circumstances. Because the undisputed facts do not support the court's determination, we reverse. On remand, the court shall determine whether modification of placement is in the children's best interests and, if so, to what extent placement should be modified.

¶2 The facts are stipulated. Dale and Heidi Schmit were married on October 10, 1992 and divorced on September 19, 2005. Two minor children were born of the marriage. The parties were awarded joint legal custody and Heidi was awarded primary physical placement. Dale was granted "liberal periods of physical placement, at reasonable times and upon reasonable notice."

¶3 Approximately three years later, Dale filed an order to show cause, seeking modification of placement and child support. The court commissioner determined there was no substantial change of circumstances, but "clarified" the physical placement schedule.[2]

¶4 Following a de novo hearing, the circuit court stated, "You know, it's, I think, a relatively close question here, but I don't think enough has been shown to show a substantial change of circumstances." The court entered an order of dismissal and Dale now appeals.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version.

[2] Heidi's attorney explained to the circuit court at the de novo hearing, "the Divorce Judgment provided for him having reasonable and liberal periods of placement. So that is why there was a clarification of what that meant merely putting down what the practice had been."

¶5 Whether to modify a physical placement order is directed to the circuit court's discretion. ***Keller v. Keller***, 2002 WI App 161, ¶6, 256 Wis. 2d 401, 647 N.W.2d 426. We affirm the court's discretionary determination when the court applies the correct legal standard to the facts of record and reaches a reasonable result. ***Id.***

¶6 WISCONSIN STAT. § 767.451(1)(b) creates a two-step process for a court to follow in determining whether to substantially modify the terms of a physical placement order entered more than two years earlier. As a threshold matter, the moving party must show there has been a "substantial change in circumstances since the entry of the last order … substantially affecting physical placement." WIS. STAT. § 767.451(1)(b)1b. If that showing is made, the court proceeds to consider whether any modification would be "in the best interest of the child." WIS. STAT. § 767.451(1)(b)1a. Where no substantial change of circumstances is shown, the question of the child's best interest need not be reached. ***Greene v. Hahn***, 2004 WI App 214, ¶22, 277 Wis. 2d 473, 689 N.W.2d 657.

¶7 Whether a substantial change of circumstances has occurred is ordinarily a legal question. ***Harris v. Harris***, 141 Wis. 2d 569, 574, 415 N.W.2d 586 (Ct. App. 1987). A substantial change in circumstances exists when "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 placement." *See* ***Keller***, 256 Wis. 2d 401, ¶7. Where the circuit court's legal conclusion is intertwined with factual findings, we may give weight to its conclusion, but we are not bound by a circuit court's determination of whether there was a significant change in circumstances. ***Id.***

¶8 We conclude the stipulated facts in the present case demonstrate a substantial change in circumstances. First, Dale's availability for placement with his children changed. Dale was living with his parents at the time of the divorce judgment and did not feel that he had suitable accommodations to exercise substantial overnight placement of his children. He subsequently purchased his own residence with separate bedrooms available for each child. In its oral decision, the circuit court adopted Heidi's argument that Dale's changed living arrangements were not a substantial change because they happened three years prior to the modification hearing. However, the relevant fact is that Dale made the changes in his living arrangements since the entry of the divorce judgment.

¶9 In addition, increased flexibility in Dale's work conditions changed his availability for placement with his children. At the time of the divorce, Dale's work conditions made it difficult for him to be available to transport and care for his children during the work week. Dale lived in Kimberly and worked in Green Bay. The children attended school in Appleton. Strict adherence to his regular work hours effectively made him unavailable to provide child care and transportation in the morning and after school. As of the hearing date, Dale had negotiated significant increased flexibility at work. He obtained permission to report to work late if he needed to transport the children to school and leave early to provide child care.

¶10 The children were also four years older at the time of the modification hearing. The parties' son was six years old at the time of the divorce and their daughter was eight. At the time of the modification hearing, the children were ten and twelve. The simple fact that a child grows older does not itself create a substantial change of circumstances. *See* ***Greene***, 277 Wis. 2d 473, ¶25. However, the age difference in this case was accompanied by an increase in

extracurricular activities since the divorce. The daughter was in band and frequently involved in practices and performances. The son was involved in various physical activities, including flag football and basketball. As a practical matter, the increase in extra-curricular activities made spending "non-overnight" time with Dale less viable as the children grew older.

¶11 At the time of the divorce, the children were also under a great deal of stress and were having severe adjustment issues. The parties' daughter suffered from selective mutism, where she was unable to speak to her teachers. As of the hearing date, she had successfully received treatment, which helped her overcome the condition and return to normal functioning.[3]

¶12 On the whole, we conclude the facts on which the divorce judgment was based differed from the present facts, and the difference was substantial so as to justify the circuit court's consideration of whether to modify placement. Accordingly, we reverse the dismissal of the motion to modify placement. Upon remand, the court shall in its discretion determine whether modification of placement is in the children's best interests and, if so, to what extent placement should be modified.[4]

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[3] Dale contends he did not seek greater placement at the time of the divorce because his children were having significant adjustment problems. Heidi does not refute this contention and we therefore deem this fact undisputed. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

[4] In his appellate briefs, Dale also requests "this court order substitution of the judge to preside over proceedings on remand pursuant to WIS. STAT. §§ 801.58(1) and (7)." Dale acknowledges that a series of divorce cases have interpreted WIS. STAT. § 801.58 as being inapplicable to certain proceedings to modify divorce judgments. *See* ***Parrish v. Kenosha County Cir. Ct.***, 148 Wis. 2d 700, 703, 436 N.W.2d 608 (1989). Dale argues that because the present case was not based upon an evidentiary record, the prohibition on substitution does not apply. However, as a threshold matter, we note § 801.58(1) states that any party may file a request for substitution with the clerk of courts. When the clerk receives a request for
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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.

substitution, the clerk contacts the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. WIS. STAT. § 801.58(2). This subsection also provides that a chief judge may review orders denying substitution. ***Id.***; *see also* ***State ex rel. J.H. Findorff v. Milwaukee Cty.***, 2000 WI 30, ¶¶32-35, 233 Wis. 2d 428, 608 N.W.2d 679. Dale fails to provide citation to authority to support his suggestion that this court may order substitution of a circuit judge pursuant to WIS. STAT. § 801.58, based upon a request in an appellate brief, or otherwise. We will therefore not consider the request further. *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286.