

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 6, 2011

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. 2010AP914

Cir. Ct. No. 2006FA6891

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

KIMBERLY C. HYING,

JOINT-PETITIONER-RESPONDENT,

V.

MARTIN B. HYING,

JOINT-PETITIONER-APPELLANT.

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

Before Neubauer , P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Martin Hying appeals from an order which modified joint legal custody and the amount of his physical placement with his child. He argues that the circuit court was without authority to make the changes

when there was no formal motion for modification and that the circuit court's decision is not supported by necessary findings. We affirm the circuit court's order as a proper exercise of discretion in determining custody and placement.

¶2 Martin and Kimberly Hying were divorced in November 2007. They have one child, age two and one-half at the time of the divorce. A marital settlement agreement incorporated into the judgment of divorce provided for joint legal custody, primary physical custody with Kimberly, and periods of physical placement with Martin for two overnights per week, but not any two consecutive overnights. Martin was also permitted to pick the child up early from daycare on his Friday overnight placement days, and placement for two non-consecutive three day weekends. The parties' agreement also provided that "[l]egal custody, placement and all financial issues related to the minor child will be reviewed in July, 2009." Ultimately an evidentiary review hearing was started August 19, 2009, and conducted over three days. On January 7, 2010, the circuit court continued joint legal custody but made Kimberly the sole decision maker for healthcare and education matters. Martin was given periods of physical placement on Wednesday evenings during the school year, overnight on Wednesdays during the summer, and every other weekend from Friday to Sunday night.¹

¶3 Martin first argues that the circuit court lacked authority to modify legal custody and the physical placement schedule because neither party filed a motion for modification. His contention simply ignores that the parties agreed to a

¹ We observe that the appellant's brief fails to include appropriate references to the record within its statement of facts as required by WIS. STAT. RULE 809.19(1)(d) (2009-10). Also, the appellant's appendix does not include a copy of the final order as required by RULE 809.19(2). Counsel for the appellant is admonished to comply with RULE 809.19 in the future. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

review hearing in one and one-half years. Testimony was taken at the divorce trial about the settlement agreement and the provision for the review hearing. Each party acknowledged that a review hearing would be conducted. Indeed, Martin testified that he hoped that after the passage of some time he would be granted the opportunity to pick the child up early at daycare other days and he acknowledged that the review would be to figure out what is in the child's best interest. Martin cannot now disavow the very procedure he requested and agreed to simply because the results are not to his liking.

¶4 The parties disagree about what standard governs the circuit court's decision since the review hearing commenced before the expiration of two years since entry of the judgment of divorce but the determination was not made until two years expired. *See* WIS. STAT. § 767.451(1)(a), (b) (within two years modification is appropriate if there is substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interests of the child; after two years modification is appropriate if there is a substantial change of circumstances). We conclude that neither provision applies. Although the parties had previously agreed to a custody and placement arrangement, they specifically requested a review hearing. The circuit court treated the matter as an initial determination of custody and placement because the parties continued to be unable to agree on what served the child's best interest. Moreover, neither party argued any standard other than the best interest of the child and neither objected when the circuit court stated at the start of its oral ruling that it was going to be determining the best interest of the child. A contention that the circuit court applied the wrong standard in modifying custody and placement was waived.

¶5 Custody and placement of a minor child must be consistent with his or her best interest. WIS. STAT. § 767.41(5)-(6). The determination of what is in a child's best interest is a mixed question of law and fact. See *Wiederholt v. Fischer*, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992). We will not disturb the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). The circuit court, as the finder of fact, is entitled to judge the credibility of the witnesses and we are required to give due regard to the opportunity of the trial court to judge such a matter. See *Hughes v. Hughes*, 148 Wis. 2d 167, 171, 434 N.W.2d 813 (Ct. App. 1988).

¶6 The circuit court found that Martin engaged in behaviors that made it difficult to co-parent with him and that Martin was less adept at meeting the child's emotional needs. We need not repeat the specific evidence the circuit court cited as examples.² The court heard and relied on expert testimony concerning the child. It found that the child was more attached to Kimberly. The circuit court's findings were based on its credibility determination. The findings are not clearly erroneous and support the decision that custody and placement set by the court serve the child's best interest.

By the Court.—Order affirmed.

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

² The circuit court's oral findings and decision stretched over thirty-eight transcript pages. The circuit court put thorough effort into the determination.

