

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 27, 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. 2011AP179

Cir. Ct. No. 2004FA1787

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

RAJ KAMAL,

PETITIONER-RESPONDENT,

V.

AYLA ANNAC,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Reversed and cause remanded with directions for further proceedings consistent with this opinion.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Ayla Annac appeals a post-divorce order denying her motion to modify her child’s physical placement schedule and other requests. The dispositive issue on appeal is whether the circuit court was required to appoint a guardian ad litem before deciding the motion. We conclude that the court was required to appoint a guardian ad litem pursuant to WIS. STAT. § 767.407(1)(a) (2009-10)¹ because the motion, if granted, would substantially alter the amount of time each parent would spend with the children. Accordingly, we reverse the order and remand for the appointment of a guardian ad litem and for further proceedings consistent with this opinion.

¶2 The pertinent facts are undisputed. Under the judgment of divorce, Annac and her former husband, Raj Kamal, had joint legal custody and shared equal placement of their child, Arun. Approximately five years after the parties were divorced, Annac filed a motion and affidavit to modify the judgment of divorce, seeking primary placement of their son and other changes to the judgment of divorce not relevant here. Kamal filed a motion to dismiss Annac’s motion to modify the judgment of divorce, citing her failure to allege a substantial change in circumstances, and a countermotion to revise physical placement. In response to Kamal’s motion to dismiss, Annac filed an amended affidavit in support of her motion to modify, citing a substantial change in circumstances as grounds for modifying placement, including allegations that Kamal was physically abusing their son.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 Approximately six weeks after filing her motion to modify, Annac moved for the appointment of a guardian ad litem, pursuant to WIS. STAT. § 767.407(1), on the grounds that her motion to modify placement “would substantially alter the amount of time” Kamal would spend with their son and that the motion “would substantially alter the terms of legal custody.” She also alleged that appointing a guardian ad litem was in their son’s best interests. In a separate motion, Annac’s attorney moved to withdraw from representing Annac.

¶4 At the hearing on the motion to withdraw, the court granted the motion and granted Annac’s request to continue the hearing on her motion to modify the judgment of divorce. However, the court expressly decided not to appoint a guardian ad litem at that time, because it had doubts regarding whether Annac would be able to show there was a substantial change in circumstances. Instead, the court delayed consideration of Annac’s motion to appoint a guardian ad litem until the hearing on her motion to modify.

¶5 Annac, through her attorney, again informed the court in a letter to appoint a guardian ad litem pursuant to WIS. STAT. § 767.407 in the event the case did not settle. The court did not appoint a guardian ad litem.

¶6 The hearing on the parties’ motions was held on September 7 and October 1, 2010. The court rendered an oral ruling denying Annac’s motion on the ground that she failed to show a substantial change in circumstances, and granted Kamal’s motion to revise the placement schedule in a way that did not substantially alter the amount of time their son spent with either parent. Regarding appointing a guardian ad litem, the court stated during its oral ruling that it would have appointed a guardian ad litem had Annac carried her burden of proof in showing that Kamal had physically abused their son. However, the court denied

Annac's motion to appoint a guardian ad litem after it found that Annac had failed to meet her burden.

¶7 On appeal, Annac argues that the circuit court improperly denied her motion to appoint a guardian ad litem to represent her son before the hearing was held on her motion to modify the judgment of divorce. Specifically, Annac argues that the court was required to appoint a guardian ad litem pursuant to WIS. STAT. § 767.407(1), as interpreted and applied in *State v. Freymiller*, 2007 WI App 6, ¶14, 298 Wis. 2d 333, 727 N.W.2d 334. We agree.

¶8 WISCONSIN STAT. § 767.407(1)(a)2. provides that the court *shall* appoint a guardian ad litem whenever physical placement of the child is contested unless: (1) revision is being sought under WIS. STAT. §§ 767.451 and 767.481; (2) the “modification sought would not substantially alter the amount of time that a parent may spend with his or her child”; or (3) either the appointment of a guardian ad litem would not assist the court because the facts make the likely determination clear, or a party is seeking the appointment for delay, or some other tactical reason not in the best interests of the child.

¶9 This court has previously held that a guardian ad litem *must* be appointed whenever the *alleged* basis for modification is a substantial change in circumstances. *Freymiller*, 298 Wis. 2d 333, ¶¶8-14. It is undisputed that Annac's motion to modify, along with her amended affidavit, alleges a substantial change in circumstances as the ground for modifying physical placement and legal custody. It is also undisputed that her motion, if granted, would “substantially alter the amount of time” that the parents would spend with their son. We therefore conclude that the circuit court was required to appoint a guardian ad litem under § 767.407(1)(a)2., and that the exception for not appointing a guardian

ad litem on a motion that would not substantially alter a parent's time with his or her child does not apply.

¶10 Kamal suggests that the court acted appropriately by not appointing a guardian ad litem until after determining whether Annac carried her burden of showing a substantial change in circumstances. We understand Kamal to be arguing that whether to appoint a guardian ad litem is left to the trial court's exercise of discretion and that, here, the court properly exercised its discretion by waiting until the close of evidence at the hearing to determine whether it was necessary to appoint a guardian ad litem. We reject this argument. The law is clear in Wisconsin that a circuit court is *required* to appoint a guardian ad litem pursuant to WIS. STAT. § 767.407(1)(a)2. to represent a child's best interests "when his or her parents contest the issue of physical placement." *Freymiller*, 298 Wis. 2d 333, ¶14.

¶11 Finally, Kamal argues that Annac "conceded at trial that the court could defer the appointment of a [guardian ad litem]." We understand Kamal to be arguing that Annac essentially waived the right to have a guardian ad litem appointed before the court decided whether there was a substantial change in circumstances. We disagree. As we said in *Freymiller*, it is not a parent's "interests that were adversely affected by the absence of a guardian ad litem," but those of Annac's and Kamal's son. *Id.*, ¶19. Neither parent has the power to waive their son's statutory right to have his best interests represented and advocated by a guardian ad litem. *Id.*

¶12 Accordingly, we reverse the circuit court's order denying Annac's motion to modify the judgment of divorce and granting Kamal's countermotion to

amend the placement schedule, and remand for the court to appoint a guardian ad litem and for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions for further proceedings consistent with this opinion.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

