

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 95-0639

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

In re the Marriage of:

TERESA LIPPERT,

Petitioner-Respondent,

v.

THOMAS LIPPERT,

Respondent-Appellant.

APPEAL from orders of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Thomas Lippert appeals from an order modifying the custody provision in his divorce judgment. Lippert's brief does not identify the issues in a readily understandable manner. He appears to argue that the trial court erroneously exercised its discretion by modifying custody and denying him the opportunity on reconsideration to submit additional evidence. We reject these arguments and affirm.

Thomas Lippert married Teresa Lippert in 1989. They divorced in June 1993. By stipulation, the parties received joint legal custody of their two children, with Thomas designated the primary custodian. Teresa received physical placement every other weekend, alternate holidays, and each weekday during Thomas's work shift. The judgment explained that "this visitation schedule is a result of the petitioner working second shift and the respondent working first shift and attempts to provide for the most physical placement opportunities of the minor children with both parents and the petitioner's mother ... who has an important relationship with the minor children."

In early 1994, Thomas began experiencing psychological problems and took extended leave from work. He then quit his job and filed notice of his intent to move the children more than 150 miles from Teresa's residence. Teresa objected to the move and also initiated contempt proceedings because Thomas was denying her visitation. In May 1994, the trial court found Thomas in contempt for denying visitation, and also enjoined him from moving the children out of Rock County until a hearing could be held on Teresa's objection.

In July, Thomas violated the injunction and moved the children to La Crosse. After they were finally located several weeks later, the trial court temporarily transferred physical placement to Teresa pending further proceedings. After a hearing on custody in September, the trial court permanently transferred primary placement to Teresa and again held Thomas in contempt. The trial court reasoned that substantially equal placement was no longer possible and that the children's best interests required placement with Teresa. Among the factors the court considered were Thomas's demonstrated signs of mental instability since the beginning of 1994, his inability to control his anger over a long period, his moving to La Crosse solely to separate the children from Teresa, the children's physical distance from their extended family if placed with Thomas in La Crosse, and the likelihood that Thomas would continue to have personal problems and to interfere with the children's relationship with their mother. However, the court did grant Thomas liberal periods of physical placement, including alternate weekends and eight weeks during the summer.

Thomas subsequently continued to interfere with the physical placement schedule and failed to pay child support, leading to additional contempt findings in November 1994. In December, Thomas filed a motion to

reconsider the custody determination. At the hearing on his motion, Lippert asked for the opportunity to present taped phone conversations that purportedly proved that the children were sexually abused in Teresa's custody. The trial court refused to hear the tapes because they did not constitute newly discovered evidence.

Awarding custody is a discretionary determination and we will not overturn the award unless the court exceeds its discretion or applies an erroneous rule of law. *Bohms v. Bohms*, 144 Wis.2d 490, 496, 424 N.W.2d 408, 410 (1988). The exercise of discretion requires a reasoning process by which the facts of record are considered in light of the applicable law to reach a reasoned and reasonable decision. *Id.* The court's primary concern in awarding custody is the children's best interests. *Johnson v. Johnson*, 78 Wis.2d 137, 148, 254 N.W.2d 198, 204 (1977). Where the parties have substantially equal periods of physical placement, modification is proper if circumstances make it impractical to continue the substantially equal placements, and modification is in the best interests of the children. Section 767.325(2)(a), STATS.

The trial court properly determined that the standard set forth in § 767.325(2)(a), STATS., applies to this case. Under the custody stipulation in the divorce agreement the children were placed with Teresa every other weekend, alternate holidays, and each working day during Thomas's eight-hour shift. While Teresa's time with the children was not exactly equal to Thomas's, it was substantially equal.

The trial court reasonably determined that the children's best interests were served by their placement with Teresa. The court fully explained its reliance on Thomas's psychological history, recent disruptive acts, violation of the injunction, and the effect of the move to La Crosse on the children. The facts of record fully support the court's findings on these matters and the ultimate determination of the children's best interests.

The trial court properly excluded Thomas's telephone tapes on reconsideration. The tapes were in existence at the time of the original hearing but were apparently not introduced on the advice of Thomas's counsel. Thomas concedes that he signed a statement consenting to the decision to withhold them. Therefore, he cannot reasonably argue that the tapes were newly

discovered evidence. Additionally, Thomas has not preserved the issue for review. He made no offer of proof. There is nothing in the record to show the tapes' relevance to custody other than Thomas's unsupported allegation.

By the Court. – Orders affirmed.

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