COURT OF APPEALS
DECISION
DATED AND RELEASED

December 7, 1995

NOTICE

No. 95-0665

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

IN RE THE MARRIAGE OF:

KARIE (MARTIN) KAMMERER,

Petitioner-Appellant,

v.

ROBERT A. MARTIN,

Respondent-Respondent.

APPEAL from an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Dykman, Sundby, and Vergeront, JJ.

VERGERONT, J. Karie Kammerer appeals from an order modifying the physical placement of her three minor children. Under the prior order, entered pursuant to a stipulation, the children spent half of the time with

Karie Kammerer and half of the time with their father, Robert Martin.[1] The modified order granted primary physical placement to Robert.

Karie contends that the trial court erroneously exercised its discretion in granting primary physical placement to Robert rather than to her, and in authorizing Robert to determine whether the children's normal educational activities could be interrupted for participation in religious events after the children reach seventh grade. Karie contends that granting this authority to Robert violates the children's free exercise of religion. Karie also asserts that the trial court erred as a matter of law in determining that her position on the motion to modify physical placement was frivolous and in not taking her ability to pay or Robert's needs into account in assessing all of Robert's attorney fees, expert witness fees and all guardian ad litem fees against her.[2]

We affirm the portion of the trial court's order granting Robert primary physical placement, including the provision giving Robert the authority to determine if the children could attend religious events that interfere with educational activities. We conclude this is not an erroneous exercise of discretion and does not violate the children's free exercise of religion. We reverse the trial court's assessment of Robert's attorney fees, expert witness fees and guardian ad litem fees against Karie because we conclude her motion for primary physical placement was not frivolous. We remand for further proceedings with regard to attorney fees.

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[1] The guardian ad litem submitted a statement pursuant to § 809.19(8m), STATS., stating that it was not necessary for him to participate in the appeal because he was in agreement with Robert's position on the issues.

[2] Karie also contends that the trial court abused its discretion by ordering, on Robert's motion for contempt, that Karie make monthly payments in the amount of $300 toward these fees. This written order was entered on April 19, 1995, after a hearing on April 5, 1995. Karie's notice of appeal and amended notice of appeal refer only to the January 23, 1995 order concerning the award of guardian ad litem fees, and the March 9, 1995 orders regarding physical placement, child support and the award of fees. We granted Robert's motion to strike all portions of the brief referring to the April 5, 1995 hearing. We therefore do not address the issues Karie raises concerning the April 5, 1995 hearing. We do not understand Karie to be raising any issue concerning the child support award.

BACKGROUND

Karie and Robert were divorced on January 9, 1989. The parties agreed at that time to joint legal custody of their minor children: Elizabeth, born December 4, 1981; Shawn, born February 4, 1984; and Heather, born September 27, 1987, with Karie having their primary physical care. Karie remained living in the marital residence in Holmen with the children.

In May 1993, Karie gave notice of her intent to move to Waukon, Iowa, which is sixty-four miles from Holmen.[3] Karie had formed a relationship with Ken Kammerer and he lived in Waukon, Iowa. Robert filed an objection to the proposed move. A guardian ad litem was appointed for the children. The court appointed a psychologist, Dr. Kipp Zirkel, to examine Karie, Robert and the children for the purpose of determining the appropriateness of removing the children from the State of Wisconsin, as well as physical placement of the children. Robert moved to modify the divorce judgment to permit him to remain in the residence in Holmen and to have primary physical placement of the children. At a hearing on June 15, 1993, the court ordered that the children not be moved permanently from the State of Wisconsin and attend school in La Crosse County in the fall, pending further order of the court.

The hearing was scheduled for August 6, 1993. Prior to that hearing, the guardian ad litem submitted his report concluding that it was in the best interests of the children that they remain in the State of Wisconsin and that primary physical placement be with Robert. The report stated that Dr. Zirkel would testify that the children should remain in Holmen with their father. An evidentiary hearing did not take place on August 6, 1993, because the parties entered into a stipulation pursuant to which joint legal custody of the minor children would continue and each parent would have physical placement of the children one-half of the time, with the children continuing to be Wisconsin residents and attend schools in the Holmen school district.

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[3] Section 767.327(1), STATS., requires that when both parents have physical placement, a parent intending to establish residence outside the state and remove the children from the state for a period exceeding ninety days must provide notice to the other parent with a copy to the court. The other parent may file an objection to the move. Section 767.327(2).

Karie had married Ken Kammerer on June 20, 1993, but she remained living in Holmen. In April 1994, Karie filed a notice of intent to move the children to Waukon, Iowa, and a motion to award her primary physical placement of the children. She moved to Waukon in June of 1994 to live with her husband, and the children remained primarily with their father in Holmen. Pursuant to a temporary order entered on December 7, 1994, a physical placement schedule was established for the children to visit their mother on weekends.

JANUARY 6, 1995 HEARING

At the hearing on Karie's motion held on January 6, 1995, Karie testified that in her opinion the children should be placed primarily with her because she could provide the children with stability. She intended not to work in order to stay home and take care of the children. She stated her husband was in agreement with this. She also explained that she and her husband had a very religious lifestyle which she believed was important for the children. She testified that she has taken the children to her church, the Worldwide Church of God, and has taken them every week when she has had them with her. Her church celebrates services on Saturdays rather than Sundays. Robert did not have an interest in the children's religious and moral training as she did, she testified. She understands Robert wants the children to learn about Christmas and Easter and takes them to his church at times, and she has never objected to that.

Karie testified that Robert worked long hours, did not provide discipline for the children as she did, and drank excessively during their marriage. According to Karie, the children told her that they wished to live with her in Iowa. Her home in Iowa is on a big corner lot with plenty of room, schools are nearby, and there are children in the neighborhood with whom her children were developing friendships. Her children had a good relationship with her husband. In Karie's view, the children were not adjusting well to the schedule stipulated to in August 1993 because it was difficult for them to be away from her fifty percent of the time. She felt they were confused by the schedule and that their behavior had changed, with more aggressiveness, anger, fighting and crying.

Maila Kuhn, a parent-child facilitator, testified that she had met with Karie and her husband, and visited Karie's home in Holmen with the children there. Her role was to help them with parenting skills and establishing a family unit. She had administered a parenting skills test to both Karie and her husband, testing their parenting skills. In the pre-test, they both scored in the middle of the normal range. On the test after the meetings with her, both their scores had increased and Karie scored above normal. Based on the test results, she had no concern about primary placement being with Karie. In her view, a home in which a parent was married was a more stable environment for children than a home in which their parent was not married.

Karie's pastor and two friends testified on her behalf, describing her relationship with her children in positive terms. Karie's husband also testified. He described his relationship and involvement with the three children, stating that he felt he and Karie could provide the children with a good family atmosphere. He, like Karie, is a member of the Worldwide Church of God.

Robert testified that it was in the children's best interests to remain in Holmen where they have been all their lives, with their friends and in the same school district. Robert felt the children did very well with the equal placement arrangement under the August 1993 stipulation. The children became upset when Karie told them that they were going to be moving with her to Iowa. In Robert's view, Karie has not accommodated the children's activities in Holmen, outside of church activities, when they are with her. He said the children had expressed anxiety to him over this but he felt they were afraid to bring it up with Karie.

Robert described instances of Karie being physically aggressive with the children--breaking a spoon when she spanked one child, slapping the kids with her open hand, and spanking beyond the point of what he considered necessary. He felt the children were very aware that they had to watch their mother's temper and not upset her. He described instances when Karie refused to let him see the children when she had primary physical placement.

Robert testified that his work schedule, when the children are with him, is Monday through Friday, 8:00 a.m. to 2:45 p.m., and no work on the

weekends. That has been his schedule since July 1993. Robert lives in a two-bedroom apartment in Holmen. He purchased a house in Holmen in May of 1994 with his girlfriend, Kathy Mosier, and his plans are, once the court proceedings are through, to marry her and move into the house. He feels it is best for the children to keep things as they are until the litigation is over. Robert does not live with Kathy, but on occasion his children have stayed overnight at the house where Kathy lives. He described his children's relationship with Kathy to be good, although he noted that Shawn had some jealousies toward her.

Robert testified that he belongs to the Holmen Lutheran Church and has occasionally taken the children to church with him because he would like them to see his religion. With regard to his alcohol consumption, Robert stated that fifteen years ago he used to go "out with the boys," but he does not drink much anymore.

The guardian ad litem called Tim Lazarcik as a witness. Lazarcik is the guidance counselor at the Holmen Elementary School and knows Shawn and Heather. He described Robert to be an active parent in the school, above average in his participation at the school. All else being equal, he thought that the children are better off not moving.[4]

Colin Ward, a family therapist who had worked with the children on and off for over a year, testified. The purpose of his counseling them was to provide a safe and supportive environment as they processed the conflict between their parents. He did not express an opinion as to which household, Karie's or Robert's, would be a better place for the children; the children had not indicated to him they had problems with either parent other than normal adjustments. He did feel that staying in Holmen would provide the children with stability, but that judgment was not based on the adequacy of either parent.

Jim Harrison, director of the counseling program at Lutheran Hospital, testified. He initially became involved with Karie and Robert when he

[4] The testimony of Elizabeth's teacher will be discussed later in the opinion.

was counseling them for the purpose of determining if there could be a reconciliation. He met with Karie only twice. When she concluded there could not be a reconciliation, he continued to work with Robert and had seen him thirty-three times between April of 1993 and the fall of 1994. In his opinion, Robert was a well-adjusted individual. Initially Robert was working excessively and Harrison did not believe he could effectively parent the children for that reason. But Robert has substantially modified his work, come to a better understanding of the divorce, and is a conscientious and concerned parent.

Dr. Zirkel, the court-appointed psychologist, testified. He did a custody and psychological evaluation in the summer of 1993, and updated that with a written report prepared in July 1994. He had spoken with Suzanne Wobig and Colin Ward, the children's counselors, since the time he prepared the report and the things he learned from them had not altered his recommendation. His conclusion was that it was in the best interests of the children to remain in Holmen. The desire to keep the same school district and community, neighbors and friends for the children was one of the factors he relied on in arriving at his opinion, but it was not the primary reason. The primary reason was that the children have a warm and close relationship with their father and their father went out of his way to ensure that the children had contact with their mother. In his view, though the children have a close relationship with their mother, they perceived it as a more conditional relationship. Dr. Zirkel stated that the children, all three individually, had expressed to him worries about their mother's temper. It was his opinion that Robert had made a more successful effort to shield the children from the conflict between the parents and had a greater interest than Karie in helping the children maintain contact with the other parent.

Dr. Zirkel did take into account the fact that Karie could remain home and be available for her children before and after school and on weekends. He acknowledged that all other conditions being equal, it is preferable for the children to be with a parent rather than a paid sitter or day care provider. He also acknowledged that, because of the third bedroom in Karie's home, it provided a better physical environment for the children than Robert's two-bedroom apartment.

Robert's employee testified, describing Robert's work hours consistent with Robert's testimony. A neighbor described Robert's involvement with his children's activities.

At the close of the hearing, the trial court granted primary physical placement of the children to Robert, with periods of physical placement with Karie in Iowa. The court adopted the placement schedule recommended by the guardian ad litem and Dr. Zirkel with certain modifications.

The trial court found that the reason for Karie's move to Iowa was for her convenience, and that while it would not be quite as convenient for her and her husband to live in Holmen, it could be done. It found there was no benefit to the children in the move. The court did not think Karie appreciated the disruption the move would have on the children and found she was placing her interests over the children's interests. The court found that circumstances now made it impractical for the parties to have substantially equal periods of placement and that modification of the equal placement order was in the best interests of the children. The court found that the children wanted to spend a lot of time with both parents but that they wanted to stay where they were and still spend time with their mother to the extent that they could. The court found that the children were doing well socially, academically and behaviorally with the current placement, and that the move would disrupt these achievements and would not benefit them. The court stated that it accepted Dr. Zirkel's report in its entirety, as well as Ward's testimony and the recommendations of the guardian ad litem. The court also found that Robert was more likely to ensure that the children have a relationship with their mother than the other way around. The court concluded that it was not in the children's best interests to move to Iowa.

The court then considered the issue of attorney fees, guardian ad litem fees and expert witness fees. The court stated that it had the authority under § 767.262, STATS., to order one party to pay the attorney fees and expert witness fees of the other; that it had authority under § 767.045(6), STATS., to order payment of guardian ad litem fees and expert witness fees; and that it had the authority under § 814.025, STATS., to order payment of such fees when a motion is frivolous. The court concluded that Karie's motion was frivolous because there was no factual or legal basis for the motion. The court found the attorney fees of $3,072 incurred by Robert to be fair and reasonable and ordered

Karie to pay them. It also ordered that she be responsible for all the witness fees, the guardian ad litem fees and the fees of Dr. Zirkel.

MODIFICATION OF PRIMARY PHYSICAL PLACEMENT

Under § 767.327(3)(b)1, STATS., when parents have joint legal custody and substantially equal periods of physical placement, and one parent contests the move of the other, the court may modify custody or physical placement if it finds all of the following:

> a. Circumstances make it impractical for the parties to continue to have substantially equal periods of physical placement.
>
> b. The modification is in the best interest of the child.

The burden of proof is on the parent seeking modification. Section 767.327(3)(b)2.

In making its determination, the court must consider these three factors: whether the purpose of the proposed action is reasonable; the nature and extent of the child's relationship with the other parent and the disruption to that relationship the proposed action may cause; and the availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent. Section 767.327(5), STATS. However, the court may also consider the factors in § 767.24, STATS.[5] ***Kerkvliet v. Kerkvliet***, 166 Wis.2d 930, 942, 480 N.W.2d 823, 828 (Ct. App. 1992).

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[5] Section 767.24(5), STATS., requires the court to consider these factors in making custody and physical placement determinations when it grants a divorce:

> (a) The wishes of the child's parent or parents.
>
> (b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.

The question is not the right of the parent to move, but whether physical placement should be transferred to the objecting parent. ***Kerkvliet***, 166 Wis.2d at 938, 480 N.W.2d at 826. This question is directed to the court's discretion. ***Id.*** We review a discretionary decision to determine whether the trial court examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion. ***In re Paternity of Stephanie R. N.***, 174 Wis.2d 745, 766, 498 N.W.2d 235, 242 (1993).

Karie argues that the trial court erroneously exercised its discretion by granting primary physical placement to Robert rather than to her because: (1) Robert has a history of working extensive hours; (2) she can stay at home to care for the children; (3) Robert has a history of drinking; (4) her home has one more bedroom;[6] (5) she has been extensively involved with her

(..continued)

> (c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
>
> (d) The child's adjustment to the home, school, religion and community.
>
> (e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.
>
> (f) The availability of public or private child care services.
>
> (g) Whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.
>
> (h) Whether there is evidence that a party engaged in abuse of the child, as defined in s. 48.981(1)(a) and (b) or 813.122(1)(a).
>
> (i) Whether there is evidence of interspousal battery as described under s. 940.19 or domestic abuse as defined in s. 813.12(1)(a).
>
> (j) Whether either party has or had a significant problem with alcohol or drug abuse.
>
> (k) Such other factors as the court may in each individual case determine to be relevant.

[6] The record does not support Karie's assertion that Robert and the children sleep on

children; and (6) she provides more religious training than Robert. These factors, according to Karie, outweigh the fact of the move to Waukon, Iowa, which is only sixty-four miles from Holmen. Karie points out that moves within the state are permitted without notice to the other parent as long as they are within 150 miles. *See* § 767.327(1)(a)2, STATS.

Although it was undisputed that Robert had in the past worked long hours, he testified that he now does not work after school or on weekends when the children are with him. This was corroborated by his counselor and his employee. Karie's friend testified that she had seen Robert in his store in the evening, but she did not know whether he had the children then. Karie's friends' testimony that they had seen the children unsupervised in the mall where the store is located was explained by Robert and his employee: one of the children had classes at the YMCA, also in the mall, and the children walked back and forth. Robert also explained that his father, with whom the children were close, was at the store most of the time, and the children were there at times to see him. The trial court could reasonably find that Robert was able to provide adequate supervision of his children even though he worked.

There was no evidence that Robert drinks excessively now. Harrison testified that Karie had not raised that as an issue in the two counseling sessions he had with her, and it had never come up in his counseling with Robert. Karie's friends both testified that Karie had complained to them during her marriage about Robert's drinking, but neither had any first-hand knowledge of his past or present drinking habits. The trial court could reasonably find that Robert's alcohol use was not a problem now.

There was evidence of Karie's involvement with, and concern for, her children and the activities, religious and otherwise, that she participated in with them. But there was also evidence of Robert's involvement with, and concern for, his children and the activities that he participated in with them. Karie's married status was considered a benefit to the children by the parent-child facilitator. And, as Dr. Zirkel recognized, Karie's ability to stay home and

(..continued)

the living room floor in his apartment. His testimony was that the children stay with him in his apartment, except that twice on weekends since September, the children have stayed at the house (which he and Kathy purchased) where Kathy and her children live. Kathy and her children slept in their bedrooms and he and his children slept on the living room floor.

her larger house were positive factors. But that did not outweigh for him, or for the children's counselor, the benefit to the children of remaining in Holmen with their father.

It was the trial court's role to weigh this evidence, along with all the other testimony. The court clearly relied to a significant extent on the report of Dr. Zirkel and the testimony of the children's counselor in deciding that it was in the children's best interests to remain in Holmen with their father. It is the trial court's role to determine the weight to be given the report of social workers and psychologists in custody disputes, *see* ***Larson v. Larson***, 30 Wis.2d 291, 300, 140 N.W.2d 230, 236 (1966), as well as the weight and credibility of witnesses' testimony in general, *see* ***Wiederholt v. Fischer***, 169 Wis.2d 524, 532 n.4, 485 N.W.2d 442, 445 (Ct. App. 1992).

The trial court considered the facts of record, applied the proper legal standard and arrived at a reasonable conclusion. We conclude that it properly exercised its discretion in modifying the equal placement schedule to give Robert primary physical placement.

RELIGIOUS ATTENDANCE PROVISION

Karie challenges the particular provision in the court's order that grants Robert the authority to determine whether, after the children reach seventh grade, they may attend religious events that interfere with educational activities. We first consider whether this provision is an erroneous exercise of the court's discretion. We conclude it is not.

The trial court considered the testimony of Karie and her pastor on the children's religious training and activities. It acknowledged the importance of religion to a child. The court found the children were receiving sufficient religious training and exposure to religion. It found that missing a week or two of school for a religious retreat did not affect the children's schooling at a relatively young age. But it also found that this did have an effect as children got older and their education became more structured and required more time and effort. The court concluded that allowing Robert to decide if the children, after reaching seventh grade, could go to the retreats would not affect their religious beliefs to any great extent and was necessary for their education.

The trial court's conclusion is supported by the record. Cynthia Baer, Elizabeth's seventh grade teacher, testified that in the sixth grade, Elizabeth's grades were in the B-C range, but her mid-quarter estimated grade for the second quarter of the seventh grade was a D-minus. She testified that Elizabeth was absent from school for ten days in September, and that, although the D-minus did not show up until the second quarter, in her view there was a correlation between the early absence and the poor progress report in the middle of the second quarter. Baer acknowledged that Elizabeth's grade from her in science during the first quarter was a B, but she nevertheless felt the poor progress report in the second quarter reflected getting off to a poor start in September. Baer testified that she discussed the ten-day absence with other teachers in her "house," who apparently also taught Elizabeth, and they felt that it was a problem for any child to be absent like that close to the beginning of the school year. She acknowledged that Elizabeth had gone to the same religious functions in prior years and had done well in those prior years.

The trial court could reasonably conclude, based on this testimony, that it was necessary for Robert to have the authority to prevent the children from going on the retreats if, when they were older, the retreats interfered with their schooling.

We next consider Karie's argument that granting Robert this authority violates the children's right[7] to exercise their religion in violation of the First Amendment to the United States Constitution and article I, section 18 of the Wisconsin Constitution.[8] This presents an issue of law, which we determine de novo.

The trial court's order does not prevent the children from belonging to the Worldwide Church of God, from believing its tenets and professing those beliefs. Nor does the order prevent or restrict their church

[7] The parties do not address whether Karie has standing to raise this issue in this context, where the children have a guardian ad litem. We assume, without deciding, that Karie may raise this issue.

[8] The First Amendment to the United States Constitution provides in part: "Congress shall make no law ... prohibiting the free exercise [of religion]." Article I, section 18 of the Wisconsin Constitution provides in part: "The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed."

attendance and religious activities, except to the limited extent that their father determines, after a certain age, that the religious events interfere with their education. Karie has provided us with no authority for her argument that this limited right of the children's father (their joint legal custodian and primary physical custodian) denies the children their right to freely exercise their religion.

Karie does cite ***Lange v. Lange***, 175 Wis.2d 373, 502 N.W.2d 143 (Ct. App. 1993), *cert. denied*, 114 S. Ct. 1416 (1994), as supporting her position. But we fail to see how that case advances her position. In ***Lange***, we rejected the First Amendment claim of a father who did not have primary physical placement or legal custody and was permitted only supervised visitation with his children until he demonstrated that he could refrain from imposing his religious views on his children. The mother in ***Lange*** was raising the children in the Lutheran church and the father had a different religious faith. We concluded that the court order did not prohibit the father from holding his religious views or discussing them with his children, but rather prohibited him from attempting to cause his children to reject their mother's choice of religion.[9] ***Id.*** at 384, 502 N.W.2d at 148. We held that the court order did not violate the father's right to exercise his religion. ***Id.***

Karie suggests that ***Lange*** supports her position because the effect of the order affirmed was to allow the children to continue in the Lutheran church, in which they had been raised prior to the divorce. But the order entered by the court in this case does not imply in any way that the children may not continue to belong to the Worldwide Church of God. We conclude the trial court's order did not violate the children's constitutional rights.

[9] As the sole legal custodian, the mother in ***Lange*** had the right to make decisions concerning the children's choice of religion. *See* § 767.001(2)(a), STATS. In this case, the parties have joint legal custody.

ATTORNEY FEES AND COSTS--§ 814.025, STATS.

Section 814.025(3)(b), STATS., permits a court to award the successful party costs and reasonable attorney fees if the losing party or the party's attorney knew, or should have known, that the action was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.[10] Whether the action is frivolous is a mixed question of law and fact. *See* ***Kelly v. Clark***, 192 Wis.2d 633, 646, 531 N.W.2d 455, 459 (Ct. App. 1995). A determination of what a reasonable attorney or litigant knew or should have known with regard to the facts requires the trial court to determine what those facts were. ***Stoll v. Adriansen***, 122 Wis.2d 503, 513, 362 N.W.2d 182, 187-88 (Ct. App. 1984). We do not overturn findings of fact unless they are clearly erroneous. ***Id.*** However, the legal significance of those findings of fact, in terms of whether those facts would lead a reasonable attorney or litigant to conclude the claim is frivolous, presents a question of law. ***Id.***

In its written order, the court stated that:

> The Court finds that the motion of the Petitioner was, in fact, frivolous. There was no factual basis nor evidence offered to support the allegation that it would be in the best interests of the minor children of the parties to be moved to Iowa. In fact, the overwhelming evidence from the professionals was that it was in the children's best interests to remain in La Crosse County. This was made abundantly clear approximately one year ago when the Petitioner first requested the right to move the children to Iowa. The Petitioner filed a motion when there had clearly been no change in circumstance. The Petitioner's desire to move the children was based only on her own convenience, and not on the facts showing that it was in the children's best interests. The unreasonableness of the Petitioner in pursuing this

[10] The parties and the trial court all appear to agree that a post-judgment motion to change physical placement is an "action or special proceeding" within the meaning of § 814.025, STATS. We assume, without deciding, that it is.

> litigation has resulted in substantial attorney's fees to the Respondent and to the children through the Guardian ad Litem and the experts employed by the Court and the Guardian ad Litem. In addition to that, the litigation certainly had an adverse effect on the children, and it has probably affected their relationship with their therapists, who have been drawn into the litigation.

Certain of the court's findings are not relevant to a determination of frivolousness. The impact of the litigation on the children is not evidence that tends to prove any of the standards or factors under § 767.327(3)(b), STATS. Therefore, what the impact was, and whether Karie or her attorney should have known that, does not go to whether her motion was frivolous.

The finding that there had been no substantial change in circumstances is also not relevant. Under § 767.327(3)(b), STATS., Karie did not need to show there was a substantial change in circumstances since the last order. That is one of the criteria under § 767.327(3)(a), applicable when the child resides with one parent for a greater period of time. Moreover, this finding is not supported by the record. At the time Karie filed the first notice of intent to move in May 1993, she lived in Holmen and was proposing to move to Iowa. She did not move to Iowa at that time. Instead, she reached a stipulation with Robert whereby they would have equal placement, and she remained living in Holmen. Her move to Iowa in June 1994, which prompted the second notice and motion, was a substantial change in circumstances. There had been no court adjudication on the merits of her first notice or on Robert's objection and motion. There was nothing in the stipulation that prevented her from moving to Iowa or seeking primary physical placement of the children if she decided to do so.

Under § 767.327(3)(b), STATS., Karie had to show that circumstances made it impractical to continue equal periods of placement and that primary physical placement with her in Iowa was in the children's best interests. The court found that the circumstances did make it impractical for the parties to continue to have substantially equal periods of physical placement. The real question, then, is whether Karie or her attorney knew or should have

known that there was no evidence to support her claim that it was in the best interests of the children to live with her in Iowa.

In this context, we examine the trial court's finding that it was abundantly clear in 1993 that the overwhelming evidence of the professionals was that it was in the children's best interests to remain in La Crosse County. The record supports a finding that Karie knew before the August 1993 hearing that the recommendations of Dr. Zirkel and the guardian ad litem were that the children should stay in Holmen. We note, however, that the guardian ad litem's position is not evidence. *See* ***Stephanie R. N.***, 174 Wis.2d at 774, 498 N.W.2d at 245; ***Hollister v. Hollister***, 173 Wis.2d 413, 419-20, 496 N.W.2d 642, 644-45 (Ct. App. 1992). The record also indicates that, with the filing of the guardian ad litem's supplemental report on January 5, 1995, Karie or her attorney knew that Zirkel, as well as the children's therapists, Ward and Wobig, and the school guidance counselor all would testify that the current arrangement under the temporary order was providing consistency and stability for the children and should be continued.

Whether this knowledge of the expected testimony of these professionals would lead a reasonable attorney or litigant to conclude that Karie's motion was frivolous presents a question of law. We conclude that it would not. A trial court's decision on physical placement is a discretionary one, and the court is not bound to accept the recommendation of experts. While a reasonable litigant or attorney would understand that a trial court would probably give significant weight to this expected testimony, that is not the question. Our inquiry is whether Karie or her attorney could reasonably conclude that there was evidence that it was in the children's best interests to move to Waukon even though there was evidence that the move would be disruptive for them. We conclude that she could.

As Robert acknowledged to Dr. Zirkel, Karie had been the primary caretaker of the children until August 1993. It is also undisputed that Robert had worked excessively in the past and that Karie would be able to stay home with the children. While Dr. Zirkel opined that Robert had the better parenting relationship with the children, Ward, the children's therapist, did not think one parent was better than the other for the children. Dr. Zirkel's report indicated that the psychological and parenting tests he performed on Karie showed her within normal limits. And the parent-child facilitator who worked with Karie

and her husband had positive things to say about Karie's parenting and considered her marriage to provide more stability for the children than a household with a single parent. The testimony about the circumstances for the children living in Waukon was positive. The testimony of Karie's pastor and friends was positive. Although the children's move to Waukon would mean they would see their father less, the distance--sixty-four miles--and Karie's frequent trips to Holmen for church activities, are evidence that the children would continue to have frequent contact with their father.

The trial court also found that Karie's decision to move to Waukon was for her convenience, not for the best interests of the children. In its oral findings, the court stated that although it would be less convenient for Karie and her husband to live in Holmen, "it could be done." While the question under § 767.327(3), STATS., is not the right of a parent to move, but whether physical placement should be transferred, *see* ***Kerkvliet***, 166 Wis.2d at 938, 480 N.W.2d at 826, one of the factors under § 767.327(5) is "[w]hether the purpose of the proposed action is reasonable." The fact that the court apparently found the purpose of the move not reasonable does not mean the motion was frivolous.[11] First, this is only one of the factors a court must consider. Primary physical placement with the parent who moves may be in the children's best interests even if all three of the § 767.327(5) factors favor the objecting parent, and even if the parent's reasons for moving are poor. *See* ***Kerkvliet***, 166 Wis.2d at 944, 480 N.W.2d at 829. Second, in the context of § 814.025, STATS., the proper inquiry is whether, given the facts that were known to Karie or her attorney, a reasonable person would have known that there was no basis for contending her move to Waukon was for a reasonable purpose.

Karie testified that she moved to Waukon because she wanted to live with her husband. They had tried maintaining two households, with his commuting to Holmen on some days, but that was financially and personally too stressful. She felt that living with her husband would provide a more stable family. Her husband testified that he was self-employed in a window cleaning business, which he had had for eleven years, and as a farmer. Karie testified

[11] We discuss the reasons for Karie's move only in the context of § 814.025, STATS. Karie did not assert, in challenging the primary placement award to Robert, that the trial court erred in finding that the move was merely for her convenience, or in concluding, implicitly, that it was not for a reasonable purpose.

that her husband had looked in the Holmen area for work, but it was too competitive.

We conclude that it was not unreasonable for Karie or her attorney to believe that this testimony provided a basis for arguing that Karie's decision to move to Waukon was for a reasonable purpose. The guardian ad litem and the court disagreed, viewing this as evidence that Karie wanted to "get on with her own life," without regard for the children's best interests. But that does not render Karie's position frivolous.

When a party claims that a proceeding is frivolous, the party must overcome the presumption that it is not frivolous. ***Kelly***, 192 Wis.2d at 659, 531 N.W.2d at 464. The issue is not whether a party can and will prevail, but whether the position taken is so indefensible that it is frivolous and the party should have known it. ***Stoll***, 122 Wis.2d at 517, 362 N.W.2d at 189. Particularly in a physical placement dispute, where the decision is discretionary, as is the weight to be given the evidence, a party should not have to accurately predict how the court will weigh the evidence in order to avoid a finding of frivolousness. We conclude Karie's motion was not frivolous.

ATTORNEY FEES--§ 767.262, STATS.; GUARDIAN AD LITEM AND EXPERT WITNESS FEES--§ 767.045, STATS.

Although the trial court's award of fees and costs appears to be primarily based on § 814.025, STATS., the court also relied on its authority under §§ 767.262 and 767.045(6), STATS. Section 767.262(1)(a) permits a court, "after considering the financial resources of both parties," to order either party to pay a reasonable amount for the costs to the other party, including attorney fees, of maintaining or responding to an action. Section 767.045(6) provides that the court "shall order either or both parties to pay all or any part of the compensation of the guardian ad litem" and "the fee for an expert witness used by the guardian ad litem" under certain conditions; "[i]f either or both parties are unable to pay, the court may direct that the county of venue pay the compensation and fees, in whole or in part...." Because of the reference to ability to pay in § 767.045(6), we construe this section, like § 767.262, to require a consideration of both parties' financial resources before ordering payment of the fees.

In its oral decision at the close of testimony, the trial court made no findings on the financial circumstances of either Karie or Robert before ordering Karie to pay the guardian ad litem and expert witness fees and Robert's attorney fees. The written order, after finding Robert's attorney fees reasonable, states: "The Respondent [Robert] does not have sufficient resources to pay the same, and to do so would place an undue burden on him." There are no other findings on the parties' financial circumstances in the written order. We have searched the record of the hearing. The only financial evidence presented was that Karie's husband had his own business and would support her if she stayed home with the children; that Karie was employed in a minimum wage job; and that Robert owned a hardware store. We cannot conclude on this record that the trial court considered the financial circumstances of the parties in ordering Karie to pay the fees.

Robert argues that the court was familiar with the parties' financial circumstances from prior proceedings, but we see no indication that it considered that evidence in ordering the payment of fees. Moreover, evidence presented at prior proceedings, some years earlier, would not be relevant unless there was also testimony at the January 1995 hearing that the circumstances were unchanged. Robert also argues that the court heard testimony on the parties' financial circumstances when it determined Karie's child support obligation two months later, on March 9, 1995. The transcript of that hearing is not part of the record. But, in any case, we fail to see how that hearing demonstrates that the court considered the parties' financial circumstances before ordering Karie to pay the fees in January 1995.

Robert argues, in the alternative, that the court did not need to make findings of Robert's needs and Karie's ability to pay because Karie "overtried" the case. He contends that it was unreasonable for Karie to bring the May 1994 motion after agreeing to the stipulation in August 1993. Robert testified that he incurred $6,000 in expenses in preparing for the August 1993 hearing.

Robert is correct that the trial court in a family matter has the discretion to award attorney fees without making findings on need and ability to pay when it determines that the manner in which one party litigates the case is unreasonable and causes the other party to incur increased attorney fees. *See* ***Ondrasek v. Ondrasek***, 126 Wis.2d 469, 484, 377 N.W.2d 190, 196 (Ct. App. 1985). However, the trial court here did not make any findings, or even suggest,

that the manner in which Karie's attorney prosecuted her motion of April 1994 was unreasonable. The court did find that it was unreasonable for her to bring the motion at all, but we have held that it was not.

In summary, we affirm the portion of the trial court's order granting primary physical placement to Robert, including the provision giving him the authority to decide if the children may attend religious events that interfere with educational activities when the children reach seventh grade. We reverse the portion of the trial court's order directing Karie to pay Robert's attorney fees, the guardian ad litem fees and expert witness fees under § 814.025, STATS. We remand for further proceedings regarding attorney fees consistent with §§ 767.262 and 767.045(6), STATS., and this opinion.

Robert has moved for a determination that the appeal is frivolous under § 809.25(3), STATS. He asserts that Karie's position that the trial court erroneously exercised its discretion in granting Robert the authority to limit the children's participation in religious events under certain circumstances was without any reasonable basis in law and equity, as is Karie's assertion that the trial court erroneously exercised its discretion in awarding primary physical placement to Robert. We have reversed the trial court's conclusion that Karie's motion to modify the physical placement order granting her primary placement was frivolous. We find the appeal is not frivolous.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.