COURT OF APPEALS
DECISION
DATED AND RELEASED

June 27, 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, 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. 95-1077

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

In re the Marriage of:

MICHAEL DONSKEY,

Petitioner-Appellant,

v.

LINDA DONSKEY,

Respondent-Respondent.

APPEAL from an order of the circuit court for Monroe County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Michael Donskey appeals from an order denying his motion to modify the physical placement provision in his divorce judgment. The issue is whether the trial court applied the proper legal standard when it ruled on the motion. We conclude that the trial court did use the proper standard, and we therefore affirm.

Michael and Linda were divorced in January 1990. The divorce judgment awarded primary physical placement of the parties' two children to Linda and assigned Michael a child support obligation. Sometime in 1991 or 1992 the parties, on their own initiative, established an equal placement schedule for the children. In May 1992, the court approved a stipulation that removed Michael's child support payments, but made no reference to the informal placement agreement.

In June 1994, Linda withdrew her consent to equal placement and the parties returned to the placement schedule set forth in the divorce judgment. Michael then moved for an order restoring the equal placement schedule of the past two to three years.

In denying that motion, the trial court placed the burden on Michael to prove that equal placement was in the children's best interest. On appeal, Michael challenges the use of that standard, and contends that the trial court should have applied a presumption in favor of equal placement, and placed the burden on Linda to rebut that presumption.

Under § 767.325(2)(b), STATS., where the parties have substantially equal period of physical placement pursuant to a court order, a rebuttable presumption exists that having substantially equal periods of physical placement is in the best interest of the children. Michael contends that the trial court should have used this standard in judging his motion. However, Michael and Linda shared equal physical placement of the children pursuant to their own informal agreement. There was no court order. Therefore, the trial court had no authority to apply the statutory presumption in § 767.325(2)(b). Instead, the trial court properly applied § 767.325(1)(b), which provides that after two years from the initial physical placement order, the court may modify that order if it is in the best interest of the children and there has been a substantial change of circumstances.

By the Court.—Order affirmed.

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