

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

September 6, 1995

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. 95-1576

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT I

IN THE INTEREST OF TIFFANY W. AND  
MYOKRA W., CHILDREN UNDER THE AGE  
OF EIGHTEEN:

DAVID C. and BEVERLY C.,

Petitioners-Appellants,

v.

MILWAUKEE COUNTY DEPARTMENT  
OF HUMAN SERVICES,  
STATE OF WISCONSIN,  
GWEN E.,  
THOMASA W. and  
ATTORNEY MICHAEL J. VRUNO,  
Guardian ad Litem,

Respondents-Respondents.

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

WEDEMEYER, P.J.<sup>1</sup> Beverly C. and David C. appeal from an order that changes placement of their foster children, Tiffany W. and Myokra W. The order changed the girls' placement from the C's home to the home of the girls' biological aunt, Gwen E. The C's claim that: (1) the trial court erred in finding that it was in the children's best interests to change placement to the relative's home; and (2) they did not receive a fair hearing on the placement issue. After careful consideration of the briefs and the record, this court concludes that: (1) the trial court did not error in its placement finding; and (2) the C's received a fair hearing. Accordingly, this court affirms.

## I. BACKGROUND

In February 1990, Myokra was placed, shortly after her birth, in foster care in the C's home because her birth mother, Thomasa W., was unable to care for her. In August 1990, when Tiffany was sixteen-months old, she was also placed in foster care with the C's. For the next five years, both girls remained in this foster placement. Throughout this time, their biological aunt, Gwen E., remained in contact with them. In 1990 and 1991, the MCDHS<sup>2</sup> permanent placement plan contemplated that the girls would eventually be able to be returned to the care of their mother. In November 1992, the permanent placement plan recommended termination of parental rights and adoption by the foster parents.

When Gwen E. learned of this revised recommendation, she advised MCDHS that she was interested in having the girls placed with her. The 1993 and 1994 permanent placement plans recommended placement with a relative.

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2), STATS.

<sup>2</sup> MCDHS is short for the Milwaukee County Department of Human Services. MCDHS is the legal guardian of both girls because they were determined to be children in need of protection or services under § 48.13(10), STATS.

Prior to the TPR/adoption discussions, the record indicates that the C's and Gwen maintained positive and friendly interactions between the two families. Sometime after the TPR/adoption discussions, however, friction and negative feelings between the C's and Gwen developed.

On March 31, 1995, MCDHS served a Notice of Change of Placement to the home of Gwen E. for June 9, 1995. On April 5, 1995, the foster parents filed objections to the placement change, pursuant to § 48.357(1), STATS. A short time later, the foster parents also filed a Petition for Review of Agency Decision, pursuant to § 48.64(4), STATS. The trial court held a hearing to determine placement for these children. The hearing took place on May 22, 23 and 26, 1995. On May 31, 1995, the trial court issued a written order changing the placement from the foster parents' home to the home of the biological aunt. The foster parents appeal from this order.

## II. DISCUSSION

### *A. Introduction.*

This court begins its discussion with the acknowledgement that resolution of this appeal was very difficult. The issues presented to this court involve the well-being of two young sisters. Neither asked to be placed in this situation. Neither deserved to be placed in this situation. No child deserves to be put in the middle of a “tug of war.” This court finds some solace in the fact that the tug of war was between two families who undoubtedly love these girls very much.

It is in part because of the obvious love on both sides, however, that makes the determination of what is in the best interests of these two little girls extremely arduous. Accordingly, this court does not envy the task shouldered by the trial court in deciding this issue. This court echoes the sentiments of the trial court expressed at the conclusion of the hearing in this matter:

This is truly a very difficult case.... The public perception that somehow this is a simple decision or that it's an easy decision or that there's only one answer is tragically wrong. There exists very compelling concerns on both sides, issue in terms of placement, and they have to be weighed very carefully.

....

I'm going to give [this decision] a very careful review and review it according to the law and the facts that have been presented.... I am going to, as I said, continue to review all these facts and circumstances, but I think that in justice to the children and in justice to everyone in this courtroom it has to be said this is not an easy decision, and the perception that has repeatedly been held forth to the public and to the

media that this is a cut and dry decision is unfair to these children.

This court has sincere concern and sympathy for the girls, as well as for both families involved. Accordingly, this court takes the task of ruling on this appeal very seriously. The issues underlying this appeal involve a multitude of human emotions that often times are beyond the capabilities of our legal system. Nevertheless, these issues are decided pursuant to our current rules of law that bind this court.

*B. The Best Interests of the Children.*

The C's claim that the trial court erred in finding that a placement change to their aunt's home was in the best interests of the children. Specifically, the C's argue that the trial court committed errors of law because: (1) it did not effectuate the purposes of Chapter 48 as set forth in § 48.01(1), STATS.; and (2) it failed to make a decision that was consistent with the children's best interests as required by § 48.01(2). The C's also argue that some of the trial court's findings of fact are erroneous. This court rejects the C's arguments.

A dispositional order requires both the exercise of a high degree of judicial discretion and a result which is in the children's best interests. See § 48.01(2), STATS. "The exercise of discretion requires judicial application of relevant law to the facts of record to reach a rational conclusion." *State v. James P.*, 180 Wis.2d 677, 683, 510 N.W.2d 730, 732 (Ct. App. 1993). The best interests standard involves a mixed question of fact and law. See *In re Adoption of Randolph*, 68 Wis.2d 64, 69, 227 N.W.2d 634, 637 (1975). Accordingly, this court reviews the facts found by the trial court under the clearly erroneous standard; however, the ultimate conclusion on those facts of where the best interests of the children lie is a question of law. *Id.* Nevertheless, because a conclusion regarding the children's best interests is so intertwined with the historical facts, this court's review affords some deference to the trial court's determination. See *Wassenaar v. Panos*, 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983).

*1. The purposes of Chapter 48.*

The C's claim the trial court's decision was contrary to the purposes contained in § 48.01(1), STATS. This section provides in pertinent part:

This chapter may be cited as "The Children's Code". This chapter shall be interpreted to effectuate the following express legislative purposes:

....

(b) To provide for the care, protection and wholesome mental and physical development of children, preserving the unity of the family whenever possible.

....

(e) To respond to children's needs for care and treatment through community –based programs and to keep children in their homes whenever possible and, in cases of child abuse or neglect, to keep children in their homes when it is consistent with the child's best interest in terms of physical safety and physical health for them to remain at home.

....

(g) To provide children in the state with permanent and stable family relationships.

....

(gg) To promote the adoption of children into stable families rather than allowing children to remain in the impermanence of foster or treatment foster care.

After a painstaking review of the entire record in this case, this court cannot conclude that the trial court's decision was contrary to the purposes expressed in this statute. In essence, the C's argument is that the primary purpose of Chapter 48 is to return the children when possible to the

family of their *parents*, not to the family of their *aunt*. The C's argue that if the family of their *parents* is not available, the purpose under § 48.01(1)(gg), STATS., of promoting adoption should be exercised.

Although "family" is not specifically defined in § 48.01, STATS., common sense, together with the definitions in § 48.02, STATS., suggest that the preference of reuniting children with their families is not limited to reunification with *parents*. Section 48.01(15) specifically contemplates the involvement of an aunt. Moreover, our supreme court recently held that "family" can be defined in many ways. See *Holtzman v. Knott*, \_\_ Wis.2d \_\_, 533 N.W.2d 419 (1995). Family may include "all the members of a household under one roof," or "a group of persons sharing common ancestry." See THE AMERICAN HERITAGE DICTIONARY 659 (3d ed. 1992). The law of this state requires that every effort be made to reunite the children with their biological families. See §§ 48.355(1), 48.01(1)(e), (g), (gg), and 767.245, STATS. This court was unable to discern any authority that limits the term "family" to the children's parents. Therefore, this court rejects the C's argument that the new placement does not effect the purpose of reunification with "family" simply because that placement is with a biological aunt rather than a parent.

## 2. *The best interests of the children.*

Next, the C's argue that the trial court erred in "removing the children from a loving and stable foster family to the home of their maternal aunt, contrary to the recommendations of the psychologists who filed reports and testified."

In addressing this contention, it is necessary to provide a summary of the witnesses' reports and testimony. **Fred R. Volkmar, M.D.** testified by affidavit. He is an Associate Professor of Child Psychiatry, Pediatrics and Psychology at Yale University Medical School. He was retained in this case by the C's and offered the opinion that, because of the amount of time that Tiffany and Myokra have spent with their foster parents, it would be in their best interests to remain with the foster parents.

**Stephen F. Emiley, Ph.D.**, is a clinical psychologist who was retained by the court to do an evaluation of the foster parents and of the aunt. He submitted written reports and testified at the hearing. In his written reports, Emiley described what could be considered negative characteristics with respect to both the C's and Gwen. His conclusion in the reports and in his testimony was that both families are capable of caring for the children. He did not give any recommendation regarding where these children should be permanently placed.

**Virginia Wright** is a staff psychologist at Children's Hospital. She was appointed by the court to conduct interactive evaluations of the children with each of the families. That is, she observed each child interacting with aunt Gwen and observed each child interacting with Mr. C. and Mrs. C. She also conducted evaluations of each child. During these evaluations, Wright indicated that both girls expressed comments illustrating their belief that they were supposed to talk badly about their aunt. Wright's interactive evaluation demonstrated that the girls enjoy and are comfortable with their aunt.

**Caroline Lenyard** is the court-appointed therapist who has been treating the girls most recently. Lenyard also conducted combined sessions between the C's and aunt Gwen in an attempt to resolve some of the conflict and tension that exists among the adults. She reported that these sessions were not successful. Lenyard recommends that the girls be permanently placed with their aunt. She initially felt that a gradual transition would be in the girls' best interests, but if the C's are unable to be positive regarding Gwen, then an immediate transfer would be appropriate.

**Jerome Smith Ph.D.**, is a psychologist from Indiana who was retained by the C's. He testified that he is an "adoption expert." He observed the children at the C's home and spoke with the C's. He did not have any contact with aunt Gwen. He reviewed many of the other witnesses' reports, but did not see Emiley's evaluation of Gwen or the interactive evaluation of Myokra. He testified that removing the girls would cause emotional and behavior problems and, because of the attachment they have formed to their foster parents, removal would be traumatic.



**Bonnie Finkler** is the foster care case worker who has been assigned to this case since August 1990. She recommends the change of placement to the aunt's home because: (1) she believes the girls will have a better sense of identity, personal history and self esteem; (2) she feels the aunt is better able to separate her wants and interests from what is in the best interests of the children than are the C's; (3) she is concerned about Mrs. C's labeling of Tiffany as a disturbed child; and (4) she is concerned about Mrs. C's overprotective tendencies.

In addition to these witnesses, several teachers testified. Two of the girls' teachers from their current schools testified that both girls have commented that they did not want to go to their aunt's home to visit. Two teachers from the school that the girls will attend if transferred to their aunt's home testified. Both indicated that in visiting the school with their aunt, the girls appeared happy to be with their aunt and were sad when it was time to return to the foster home.

In addition, evaluations of the "fitness" of both the C's home and Gwen's home were performed. Both homes received a stamp of approval. It is also significant that the girls' biological mother testified at the hearing. She indicated that she did not want her parental rights terminated and that it would be okay with her if the girls are placed with either the C's or Gwen.

In evaluating this evidence, the trial court indicated:

The Court has weighed the many competing concerns in reaching this decision. Of great weight were the consistent and compelling reports, testimony, and opinions of Dr. Stephen Emiley, who evaluated all of the adults and has extensive experience with Children's Court proceedings; Dr. Virginia Wright, who has had the opportunity to meet repeatedly with all of the adults and to evaluate each of the children; Therapist Caroline Lenyard, who has also had contact with the children over the last 18 months in therapy; the case worker, Bonnie Finkler, who has followed the case and the children

since 1990; and the recommendation of the Guardian Ad Litem, Michael Vruno, who has represented the interests of the children since the initiation of proceedings in Milwaukee County. The Court has also weighed the potential harm the children may experience if removed from their foster home against the harm they are currently experiencing from emotional pressure and restricted contact with their biological family.

The trial court also made numerous findings of fact with respect to the witnesses' testimony. It is evident from the record that witnesses offered opinions in favor of both sides. Volkmar and Smith clearly felt that the C's should retain placement of the girls. Lenyard and Finkler felt strongly that the girls placement should be changed to their biological aunt. Emily offered positives and negatives with respect to both placements. The C's issue statement—that the trial court ignored the recommendations of the psychologists that the children should not be removed from the C's home—is partially erroneous.

The C's challenge to the trial court's determination regarding the best interests of the children essentially rests on the trial court's assessment of the credibility of the witnesses. Witness credibility is left to the exclusive domain of the finder of fact, here the trial court. *Gehr v. City of Sheboygan*, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977). When conflicting evidence is presented, it is the duty of the fact finder and not this court to determine the weight to be given to each version and any conflicts are resolved by the fact finder. *Rabata v. Dohner*, 45 Wis.2d 111, 117, 172 N.W.2d 409, 411 (1969). Although this court independently reviewed all of the reports and the entire hearing transcript, as noted above, some deference is owed to the trial court in this matter and its credibility determinations will not be disturbed unless it relied on evidence that was “inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts.” *State v. Tarantino*, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

The trial court decided to rely on those witnesses that favored placement with the aunt. The evidence that the trial court relied on was not

“inherently or patently incredible.” The trial court relied on the opinions of trained professionals who had an opportunity to personally interact or evaluate the girls and both potential placements.

This court's independent analysis of what is in the best interests of these two girls comports with the conclusion reached by the trial court. The factors for this decision are as follows. The evidence is such that both families are capable of caring for these children. Factors favoring the C's are that they have admirably cared for these girls for over five years, and they have formed an attachment that undoubtedly will cause some emotional distress if broken. The factors favoring aunt Gwen are that: (1) the law in Wisconsin favors a return to the biological family when possible; (2) the girls' sibling resides with the aunt; (3) the aunt has demonstrated, through the protracted litigation involved, her commitment to these children. In addition, parental rights have not been terminated, nor does the biological mother want her parental rights terminated. An adoption by the C's would require this, and this court fears that the resulting legal battle would undoubtedly further stress the children. Further, the tug of war occurring over these innocent children was unnecessarily creating strain on their emotional well-being. Children are very observant. Attempts to shield them from the tension and conflicts that occur are rarely one hundred percent effective.

In evaluating what is in these children's best interests, therefore, this court weighs whether the benefits of growing up with their brother in their biological family outweighs any emotional trauma the transfer may cause. In this case, this court agrees with the trial court that the answer to this question is yes. There is no credible evidence that the aunt's home presents a threat; the aunt has special training in dealing with young children with emotional disturbances; and the evidence indicates that the aunt's natural children are healthy, happy kids.<sup>3</sup>

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<sup>3</sup> The C's also claim that the transfer should have been gradual rather than abrupt. Because the transfer is an “accomplished fact,” and because this court has determined it is in the children's best interests to be placed with their aunt, there is no reason for this court to address this alleged error. See *In Matter of Z*, 81 Wis.2d 194, 260 N.W.2d 246 (1977).

### 3. *The trial court's findings of fact.*

Next, the C's challenge several of the trial court's findings of fact. Before addressing each of the challenged facts, this court notes that in reviewing findings of fact, the issue is not whether this court, in retrospect, would find the same or different facts, but whether there is reasonable support in the record for the facts as found. See *In re Becker*, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977). This court's review is limited to whether the facts found by the trial court are clearly erroneous.

The C's contend that the trial court mischaracterized the views of the biological mother. The C's claim that the biological mother had a preference for her girls to remain with the C's rather than be transferred to their aunt. This court has independently review the testimony of the mother and must reject the C's contention in this regard. The mother's testimony, viewed in its entirety, indicates that the biological mother would be okay with either placement. The only thing that the biological mother was emphatic about was her desire against a termination of parental rights.

The C's next contend that the trial court's finding that the children have been under pressure to respond negatively to their biological family was erroneous. Again, this court cannot conclude that the trial court's finding in this regard was clearly erroneous. The strongest evidence of the pressure the girls perceived was revealed during the interactive evaluations conducted by Virginia Wright. Wright observed the girls questioning their aunt regarding whether she had food in her home, the uncomfortableness each girl felt when questioned by the C's as to the girls' interaction with their aunt, the secretive nature of certain responses, and the girls' indication that they couldn't talk about certain things all support the trial court's finding.

The C's next contend that the trial court's finding that the girls will suffer trauma if they are prevented from developing secure relationships with their birth family is erroneous. Again, this court disagrees. There is evidence in the record that the girls need this contact to develop self-esteem and a sense of personal history, especially as they grow older.

The C's next contend that the trial court misstated the recommendation of Dr. Wright. The trial court found that Dr. Wright recommended removal from the foster home if the foster parents impede the reintegration process. The only error with the trial court's finding in this regard is that the trial court attributes Dr. Wright's recommendation to her 1994 report. The C's are correct that this recommendation is not explicitly contained within that report. However, a review of Dr. Wright's reports in toto, together with her testimony at the trial, leads this court to conclude that it was appropriate for the trial court to make this inference from Dr. Wright's testimony regarding the importance of this custody "battle" being resolved expeditiously.

The C's next challenge the trial court's findings regarding alleged marital problems or domestic troubles. The trial court's finding stated: "T.W. also appears to be experiencing stress related to the domestic situation in the home of the foster parents. In April of 1995, T.W. reported to Dr. Wright that she and M.W. were fearful of physical force, and testing revealed pervasive concerns about parental conflict in the foster home." Again, there is evidence in the record to support this finding—specifically Dr. Wright's evaluations. Accordingly, this court cannot say this finding is clearly erroneous.

The C's also challenge the trial court's findings regarding Lenyard's recommendations. This court has reviewed the challenged findings as well as the record. With the exception of the time reference of eighteen months, which this court does not find significant, the record demonstrates that the trial court's findings are supported.<sup>4</sup>

The C's also contend that the trial court should have made additional findings with respect to aunt Gwen. The lack of findings the C's claim should have been included do not merit reversal. The fact that Gwen could not care for Tiffany four or five years ago is irrelevant. There are explanations contained in the record regarding why certain visits were canceled

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<sup>4</sup> Within their challenge to this finding, the C's also contend that the trial court should have struck Lenyard's testimony because she was not an expert and was not asked to make a recommendation on placement. As the finder of fact, the trial court is the sole arbiter of credibility and determines the amount of weight to assign to Lenyard's testimony. The trial court relied on Lenyard's opinion because she was the current therapist involved in this case and from that perspective Lenyard was qualified to offer her opinion.

and the fact that Gwen is a single mother with four other children under her care does not mean she is incapable of caring for the girls. The record demonstrates that the evaluations of Gwen indicated that she is capable of caring for these children.

In sum, this court cannot conclude that any of the findings challenged by the C's are clearly erroneous.

*C. Fair Hearing.*

The C's also claim that they did not receive a fair hearing because: (1) the trial court had made up its mind to change placement before the hearing; (2) the foster parents were denied discovery rights; (3) the trial court refused to grant a continuance requested by the foster parents because they needed time to review the expert reports in order to adequately represent their rights at the hearing; (4) the trial court struck many of the foster parents' witnesses without cause, and the trial court struck portions of the affidavit of Fred R. Volkmar, M.D., an expert witness retained by the foster parents. This court rejects each of these contentions for the reasons discussed below. Accordingly, this court concludes that the C's received a fair hearing.

*1. Pre-determination by trial court.*

The C's argue that the trial court had determined, prior to the hearing, that it would order the placement change. The record does not support the C's contention. At the conclusion of the hearing, the trial court indicated orally that it had not made a placement decision and before ruling, the trial court wanted to again examine the facts and the law on the issue. This court's review of the transcripts lead to the conclusion that the trial court's exposition at the close of the hearing was sincere. Accordingly, this court rejects the C's argument that any pre-determination on the part of the trial court prevented them from receiving a fair hearing.

*2. Discovery.*

Next, the C's argue that they did not receive a fair hearing because they were denied discovery rights. Specifically, the C's claim that the trial court refused to allow them to depose Gwen E. and Thomasa W. and that they could not depose the experts on their opinions and recommendations. Section 48.64(4), STATS., defines the foster parents' discovery rights. It provides in pertinent part:

At all hearings conducted under this subsection, the head of the home ... shall have an adequate opportunity, notwithstanding s. 48.78(2)(a), to examine all documents and records to be used at the hearing at a reasonable time before the date of the hearing as well as during the hearing, to bring witnesses, to establish all pertinent facts and circumstances, and to question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses.

Prior to the C's requesting a hearing, they did not have any discovery rights. *See* § 48.293, STATS.

Section 48.64(4), STATS., does not provide the C's with the right to take depositions of unwilling witnesses. Therefore, the trial court's decision refusing them that right did not violate the statute.

### 3. *Continuance.*

The C's also claim that the trial court should have granted a continuance because they did not have sufficient time to review the reports of the witnesses. As soon as the C's requested a hearing pursuant to § 48.64(4), STATS., they were entitled to the witness reports. However, they did not demand copies of the reports until the day of the hearing. Accordingly, the timing of their receipt of these reports was in part due to their counsel's inaction. The trial court cannot be faulted for this. Moreover, it is clear from the transcripts that the examination of the witnesses was complete and thorough. Therefore, the fact that the C's did not receive the reports until the day of the

hearing did not affect their counsel's ability to adequately represent their interests in this case.

Further, time was of the essence both because of concerns that the current dispositional order would expire on June 2, 1995, and because of the emotional effect the custody battle was having on the girls. Given these factors in light of the facts referenced above, it was appropriate for the trial court to refuse to grant a continuance.

4. *Evidentiary rulings re: witnesses.*

The C's also claim that the trial court erred in striking many of their important witnesses. The trial court excluded certain witnesses because of the remoteness of their involvement and/or because of the cumulative nature of the testimony. Exclusion of evidence is addressed to the discretion of the trial court. *Prill v. Hampton*, 154 Wis.2d 667, 678, 453 N.W.2d 909, 913 (Ct. App. 1990). Evidence is irrelevant because of remoteness if the elapsed time is so great as to negate all rational or logical connection between the fact sought to be proved and the evidence offered to prove the fact. *State v. Oberlander*, 149 Wis.2d 132, 143, 438 N.W.2d 580, 584 (1989).

Witnesses Julie Vogelsang and Pat Wendt were excluded as witnesses because the home studies that each conducted in April 1994 were reviewed by the court and made a part of the record. Accordingly, the trial court determined that additional testimony from each at the hearing would be cumulative to their reports. It also found that the testimony would be too remote because it was over a year old. This conclusion was reasonable based on the facts presented and, therefore, was not an erroneous exercise of discretion.

Witness Marjorie Wendt, who was the proposed adversary counsel for the children, was excluded as a witness based on privilege, cumulative nature of her testimony and the fact that her proposed representation was terminated by court order. The C's do not present any evidence, nor does this court see any evidence in the record to conclude that excluding Wendt's testimony constituted an erroneous exercise of discretion.



Even if it was improper to exclude Wendt's testimony based on attorney-client privilege, the alternative reason relied on by the trial court is sufficient.

Witness Michael Bohren, guardian ad litem in Waukesha County, was excluded as a witness for the same reasons as Marjorie Wendt. This court's conclusion on this exclusion is the same.

Finally, portions of Volkmar's affidavit were struck by the trial court. The trial court struck certain portions of Volkmar's affidavit because the affidavit stated certain opinions without specifying the basis for those opinions or the facts Volkmar relied on in reaching those particular opinions. It was reasonable for the trial court to strike those opinions.

In sum, this court concludes that the C's were in fact afforded a fair hearing.

*By the Court.* – Order affirmed.

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