COURT OF APPEALS
DECISION
DATED AND RELEASED

April 24, 1997

NOTICE

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.

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

No. 95-2511

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

IN RE THE MARRIAGE OF: KIM T. TIMM,

PETITIONER-RESPONDENT,

V.

DENNIS L. TIMM,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waupaca County: PETER C. DILTZ, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Dennis Timm appeals from an order revising the custody and physical placement provisions of his divorce judgment. He challenges several aspects of the trial court's exercise of discretion. Because we conclude that the trial court properly exercised its discretion, we affirm.

Dennis Timm and Kim Vaughan (formerly Timm) divorced in June 1992. By stipulation, the judgment provided for joint legal custody and an equally divided physical placement schedule for their three-year-old daughter, Amber. The stipulation also provided that the custodial arrangement would be reviewed, if necessary, within two years "to determine which of the parties would be designated as Amber's primary care giver." The parties also stipulated that "the criteria to be applied by the court when the review takes place shall be what is in the "best interest" of Amber and shall not be governed by the provisions of § 767.325, STATS."

In early 1994, both Kim and Dennis petitioned for a change of the physical placement schedule. The end result, after mediation failed, was an order maintaining the status quo. In November 1994, Kim petitioned for an order declaring her to be the primary caretaker. Dennis petitioned for the same relief. After further litigation, the trial court awarded Kim the primary physical custody and modified the physical placement schedule so Amber was with Kim about 65% of the time and with Dennis about 35% of the time. In so ruling, the trial court found that both parties believed the present arrangement was impractical; that it was appropriate for Amber to attend school in the district where Kim lives; that the schedule unduly disrupted Amber's life, now that she was attending school; and that Kim could spend more quality time with Amber than Dennis because she was not working outside of the home.

On appeal, Dennis contends that the trial court erred by not following the proper statutory standard for modifying physical placement and custody, by misconstruing evidence and the guardian ad litem's recommendation, and by making a decision that is not supported by the evidence.

Section 767.325(2), STATS., entitled "MODIFICATION OF SUBSTANTIALLY EQUAL PHYSICAL PLACEMENT ORDERS," provides in paragraph (a), that "[i]f the parties have substantially equal periods of physical placement pursuant to a court order and circumstances make it impractical for the parties to continue [that arrangement], a court … may modify such an order if it is in the best interest of the child." Paragraph (b) provides that where circumstances do not make an equal placement impractical, the court may modify an equal placement after two years, if it is in the child's best interest and there has been a substantial change in circumstances since entry of the last order. Additionally, there is a rebuttable presumption that equal placement is in the child's best interest under § 767.325(2)(b).

It is not clear whether the trial court applied the standard set forth in § 767.325(2)(a) or (b), STATS. However, it does not matter because the trial court's findings support the award under either standard. As noted earlier, the court found that both parties believed the then present arrangement impractical; that since the last order Amber had begun attending school, thus making the present schedule disruptive; and that Kim was able to spend more time with Amber; and that it was going to maintain the factors of the original arrangement which were best for Amber and to change those that were not. Those findings support the court's decision under either the § 767.325(2)(a) standard, impracticability and best interest, or the § 767.325(2)(b) standard, a substantial change of circumstances and best interest.

Dennis advances three other arguments. First, he correctly notes that the trial court failed to make an express finding that modification was in Amber's best interest. However, within the trial court's decision there is an unmistakable, implicit finding to that effect, *e.g.,* "It's my intent to keep those elements of the

present arrangement that seem beneficial and 'stable' to Amber but lessen the disruption." "[A] remand directing the trial court to make an explicit finding where it has already made unmistakable but implicit findings to the same effect would be both superfluous and a waste of judicial resources." ***Englewood Apartments Partnership v. Grant & Co.***, 119 Wis.2d 34, 39 n.3, 349 N.W.2d 716, 719 n.3 (1984).

Second, Dennis contends that the trial court failed to address the rebuttable presumption in § 767.325(2)(b), STATS., in favor of equal placement. Dennis cannot avail himself of that presumption, however, because he also petitioned to modify the placement schedule. Under the doctrine of invited error, Dennis cannot petition the trial court to set aside the presumption, and then claim error when the trial court does so. ***In re Shawn B.N.***, 173 Wis.2d, 343, 372, 497 N.W.2d 141, 152 (Ct. App. 1992).

Third, Dennis contends that the trial court erred by giving the parties' stipulation some weight even though it had arguably expired. The contention is without merit because we affirm the trial court's order under the more restrictive statutory standards.

Dennis has not demonstrated that the trial court misconstrued evidence or the guardian ad litem's recommendation. He states that despite his petition, his testimony "makes clear that no matter what the court decided, [he] was looking for a substantially similar arrangement as currently was had." If true, that testimony would contradict the trial court's finding that both parties deemed the present arrangement impractical. However, Dennis provides no record citations for his testimony. The reviewing court need not sift the record for uncited facts. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis.2d 319, 324, 129 N.W.2d 321,

323 (1964). In any event, as we have noted, the trial court's decision is sustainable under the standard set forth in § 767.325(2)(b), STATS.

As for the guardian ad litem, Dennis points out that the trial court stated that it was giving his recommendation great weight, but then rejected that recommendation insofar as it advocated maintaining the present physical placement schedule. However, the trial court did accept other recommendations[1] made by the guardian ad litem and incorporated them into its order. We therefore see no inconsistency in the trial court's statement and its decision.

Dennis argues, essentially, that the trial court lacked sufficient evidence to modify the divorce judgment because the court-appointed psychologist recommended no modification. The trial court addressed the psychologist's testimony and gave a reasoned explanation for rejecting his recommendations. The weight and credibility assigned to a witness' testimony, including an expert's opinion, is a matter left to the fact finder and we will not reverse its determination. ***State v. Walstad***, 119 Wis.2d 483, 519, 351 N.W.2d 469, 487 (1984). A fact finder is not bound by an expert's opinion, even if it is uncontradicted. ***Krueger v. Tappan Co.,*** 104 Wis.2d 199, 203, 311 N.W.2d 219, 222 (Ct. App. 1981). The evidence supports the trial court's decision.

By the Court.—Order affirmed.

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

[1] For example, the guardian ad litem recommended that Amber continue in the Waupaca schools; so did the court. He concluded both parties were effective parents; so did the court.