

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2442-FT

Cir. Ct. No. 2006FA550

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

LYSSA J. SCHMIDT F/K/A LYSSA J. FISH,

JOINT-PETITIONER-RESPONDENT,

v.

SCOTT A. FISH,

JOINT-PETITIONER-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
DEE R. DYER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Scott Fish appeals an order dismissing his motion to modify physical placement of the child he shares with his former wife, Lyssa

Schmidt.¹ Fish argues the circuit court erred when it dismissed the motion based on Fish's failure to show a substantial change in circumstances. Although we affirm the motion's dismissal, our affirmance is based on reasons other than those cited by the circuit court. Specifically, we affirm because the motion, on its face, was deficient.

BACKGROUND

¶2 Fish and Schmidt were divorced in December 2006. Pursuant to a marital settlement agreement incorporated into the divorce judgment, the parties agreed to joint legal custody of their son. The agreement set forth a schedule that resulted in the child spending approximately 68% of his time with Schmidt, and the remainder with Fish.

¶3 In December 2010, Fish moved the circuit court to modify the parties' current placement schedule by granting him equal placement.² In August 2011, the parties submitted briefs and position statements on the motion, and the matter was scheduled for what was described as a "custody hearing." Before taking any evidence, Schmidt's counsel moved to dismiss Fish's motion to modify placement on the ground that there was no substantial change in circumstances. Based on the parties' respective briefs and oral argument, the court concluded: "[U]nder the situation here today, I must find that there has not been the showing

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2009-10 version.

² The motion also sought a modification of Fish's child support obligation. The court ultimately accepted the parties' stipulation that Fish is no longer obligated to pay child support.

that there is a substantial change in circumstances here for this issue to be litigated.” The court dismissed Fish’s motion and this appeal follows.

DISCUSSION

¶4 Because Fish’s motion to modify physical placement was filed more than two years after the divorce judgment, it is governed by WIS. STAT. § 767.451(1)(b). As a threshold matter, the moving party must show there has been a “substantial change of circumstances since the entry of the last order ... substantially affecting physical placement.” WIS. STAT. § 767.451(1)(b)1.b. If that showing is made, the court proceeds to consider whether any modification would be in the best interests of the child. WIS. STAT. § 767.451(1)(b)1.a. Where no substantial change of circumstances is shown, the question of the child’s best interests need not be reached. *Greene v. Hahn*, 2004 WI App 214, ¶22, 277 Wis. 2d 473, 689 N.W.2d 657.

¶5 Here, Fish’s form motion to modify placement included the following language: “This request is based on the following substantial change in circumstances that have occurred since the entry of the prior court order in this case.” In response, Fish checked a box indicating: “There is not a placement schedule and the parties cannot agree.” As noted above, however, the parties had a placement schedule under the divorce judgment. Ultimately, the motion provided no facts or explanation alleging a substantial change in circumstances. WISCONSIN STAT. § 802.01(2)(a) provides, in relevant part, that “[a]n application to the court for an order shall be by motion which ... shall state with particularity the grounds therefor.” Because the motion, on its face, failed to state with particularity the basis for granting the relief requested, the motion should have

been dismissed for Fish's failure to comply with the statutes governing procedure in civil actions. *See* WIS. STAT. § 805.03.

¶6 Rather than dismiss the motion for its deficiency, the court dismissed it ostensibly on the merits without an evidentiary hearing. As noted above, the parties filed briefs and position statements on the motion to modify placement. After counsels' arguments on Schmidt's motion to dismiss, the court found there was no substantial change in circumstances. An attorney's arguments, however, are not evidence. *See Merco Distrib. Corp. v. O & R Engines, Inc.*, 71 Wis. 2d 792, 795–96, 239 N.W.2d 97 (1976).

¶7 Although the circuit court erred by effectively deciding Fish's motion to modify placement without an evidentiary hearing, we nevertheless affirm the court's dismissal of the motion based on its facial deficiency. *See Mercado v. GE Money Bank*, 2009 WI App 73, ¶2, 318 Wis. 2d 216, 768 N.W.2d 53 (we may affirm circuit court decision on different grounds than those relied on by circuit court).

By the Court.—Order affirmed.

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

