COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2002

Cornelia G. Clark
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. 01-3279 **Cir. Ct. No. 97-PA-43**

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

IN RE THE PATERNITY OF QUENTIN J.Z. AND DAVID A.Z.:

BARBARA M.Z.,

PETITIONER-APPELLANT,

V.

DAVID P.C.,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Polk County: ROBERT H. RASMUSSEN, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J. and Peterson, J.

¶1 PER CURIAM. Barbara Z. appeals a judgment granting David C.'s motion for primary physical placement of their two sons. Barbara argues that the trial court erred by finding a substantial change in circumstances and transfering

the boys' primary placement to David. She further contends that the court erroneously prevented a witness from testifying telephonically and erroneously allowed a nondisclosed witness to provide an expert opinion. Because the record supports the trial court's exercise of discretion, we affirm the judgment.

BACKGROUND

¶2 Barbara and David met in 1987 and lived together at various times, but never married. They had two sons, one born in 1990 and another born in 1992. After the youngest was born, the parties separated and never resumed their relationship. The children remained living with Barbara.

¶3 Barbara testified that she was forty-five years old at the time of trial. Since 1987, she has held a variety of jobs, including bartending, cleaning and lawn care. The record indicates during that time period, she moved approximately fifteen times and lived in four different towns. At various times, she lived with one or more of her four daughters from other relationships and four different men, including her ex-husband and her daughter's boyfriend. At one time, she and the two boys lived with three others in a two-bedroom residence. At the time of trial, Barbara was not employed but was planning to start a daycare business in her home.

¶4 David was thirty-seven at the time of trial. He testified that he lives in Amery and operates a bar and grill. David married in 1999. He owns a three-bedroom home where he lives with his wife and their fourteen-month-old daughter. His wife teaches special education at an elementary school.

¶5 David complained that Barbara interfered with arranging visits with the boys and that she did not require their oldest son to attend school regularly.

He testified that he received a telephone call from the school principal, who told him his son was "borderline truant" and asked if there was any way David could help. David also testified that when he handed Barbara a written visitation schedule, "she briefly read it and walked over to the dumpster and threw it right in there."

¶6 In November 1999, Barbara moved from Amery to River Falls with the two boys. After she moved, David's concern about the instability in his sons' lives and the problems he experienced exercising his placement rights led him to seek primary physical placement. He testified that one time when they were to meet in New Richmond, he waited an hour but Barbara never showed up. Another time, when he went to pick up the children she refused to allow him to take them. David further testified that when he would ask for extra visitation to go, for example, to a birthday party, "she would just deny me, just no reason." At times when he did obtain placement, Barbara would later call and complain. David testified: "[T]hey didn't brush their teeth one night evidently, but she was calling about it and very rude and swearing. … And she would call like five times over this one issue." David stated that if he dropped the boys off at 5:30 p.m. on a Sunday, she would be calling by 7 p.m., and this happened regularly.

¶7 Testimony at the two-day trial included that of Dr. John Hamann, a psychologist. He testified that the boys were polite, responsive, controlled their behavior well and appeared to be doing well in school. Hamann was concerned, however, that despite the positive attributes Barbara had to offer, she was impulsive and her lifestyle was chaotic. Hamann believed that living with David and his wife offered the children better stability, consistency and communication. He believed that as the boys neared adolescence, these factors weighed in favor of primary placement with David.

¶8 Hamann took into account the boys' expressed preference to continue to live with their mother. He also noted that the older boy was adverse to attending school in Amery, where his father lived. The boy complained of difficulties with other children when he previously attended school there. Hamann believed that it would be beneficial to the boy's development to learn to deal with the school issues.

¶9 The court concluded that there was a substantial change in circumstances, stating:

> I have no difficulty whatsoever finding the substantial change of circumstances. That leaving the Amery community which was the place of residence for both parents and the children in 1996 when the last order was formulated and entered is a substantial change of circumstances in and of itself, and there are a whole array of other changes of circumstances which likewise can be considered to be substantial.

¶10 The trial court awarded joint legal custody. However, the court further concluded that the reallocation of the periods of physical placement was in the best interests of both children. It ordered primary placement with David and periodic placement with Barbara.

¶11 The trial court discussed each statutory factor under WIS. STAT. § 767.24(5) that led to its decision. Because our standard of review requires scrutiny of the court's reasoning, we set out in detail the court's discussion.

¶12 First, the court took into account the wishes of the parents and those of the children. The court observed that the children preferred to live in River Falls with their mother. However, after speaking with the children, the court found that they were not "nearly as adamant … about where they wanted to live as I had been led to believe." The court concluded that the older child's problem

with Amery schools is more of a problem with "one person" than with the institution itself.

¶13 Next, the court noted that David has spent less time with the children than Barbara has. The court found, however, that David had to obtain a court order to structure placement and "has utilized every opportunity he had been afforded." The court did not find fault with David for any alleged failure to spend meaningful time with the children.

¶14 With respect to the children's adjustment to home, school, religion and the family, the court stated:

> I don't know what your reason is [Barbara] that you haven't gotten these boys into a church program of some sort. You know, maybe you don't believe in church. That's up to you and we don't need to go there. The fact of the matter is that any exposure to religion that they have had so far have come primarily from the time they spent with their father. Both boys apparently want to have some exposure to religion and are hopeful that whatever the court orders will allow for that.

¶15 In addition, the court considered that the need for regular and meaningful periods of physical placement to provide stability and predictability for the children was a significant factor, explaining:

> It clearly has been an area in which you have had significant deficiencies, [Barbara]. To call your history of living situations and employment situations and social relationships anything less than unstable, unpredictable, and if you will, chaotic, ignores the clear and unequivocal content of this record.
>
> … I didn't hear anything here during the last two days that indicates to me that we are going to see any greater degree of stability in your life, [Barbara] than what we have seen. I have serious reservations about whether you have well thought out plans with regard to this day care situation. … I have a great deal of concern about whether your current living situation can realistically continue under

> the current economic conditions. [Dr. Hamann] says Barbara is still in transition. She is more impulsive. She lacks consistency. David, on the other hand, has moved on with his life. David is more consistent and predictable.

¶16 With respect to the issue of cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party, the court stated:

> I assess the demeanor of the parties and that all goes to the issue of credibility. You are very defensive, [Barbara]. You are, and I will make this finding on the record, in my opinion, far less candid than [David] is.
>
> I found your testimony at times … implausible. And I have a great deal of skepticism with regard to whether you are in reality in terms of your situation in life….
>
> I am particularly concerned about your unwillingness to accurately assess the fault or blame for a particular situation.…
>
> I just can't accept that you have such an unrealistic view of your role with regard to these ongoing communication difficulties.
>
> You both need better communication skills. You both need some counseling.

¶17 The court also found that a significant factor was whether each party could support the other's relationship with the children, including encouraging and facilitating frequent contact or whether one party would likely unreasonably interfere with the children's continuing relationship with the other party. The court stated:

> If it comes close to a significant factor or a primary factor in terms of this court's analysis, this is the factor. I cannot imagine that a parent … has to apply in writing for extra time. I just cannot fathom how two humans, 37 years old and 45 years old, how one of them has to apply in writing for extra time with his children. That to me is as clear an indicator as I can see that there is … likelihood of unreasonable interference.

¶18 In addition to these factors, the court discussed others, but determined that they were of less weight. For example, the court noted Barbara's daughter had testified that many years earlier David had sexually abused her. The court specifically declined to find whether the abuse occurred, but observed that the manner that Barbara handled the allegations evinced impaired judgment. The court also found that David demonstrated poor judgment when he permitted the boys to take a sip of an alcoholic beverage he was drinking while they were fishing, as well as when he drove a vehicle after having an alcoholic beverage.

¶19 The court further found that Hamann's report was corroborated by evidence adduced at trial regarding the parties' personalities. In addition, the court considered the guardian ad litem's recommendation that the children remain in their mother's custody, with greater periods of placement with their father. Nonetheless, the court concluded that all of the factors, when taken together, weighed in favor of the boys' primary placement with their father. The court found that the presumption of current placement was overcome and that its decision was in the children's best interests and maximized the likelihood that they would flourish physically and psychologically.

DISCUSSION

A. SUBSTANTIAL CHANGE IN CIRCUMSTANCES

¶20 Barbara claims that David failed to prove a substantial change in circumstances, which is necessary for a modification of placement. We conclude that the record supports the trial court's determination that there was a change in circumstances and that the change was substantial.

¶21 WISCONSIN STAT. § 767.325(1)(b)[1] provides that, after two years, a court may substantially change physical placement if the modification is in the child's best interest and there has been a substantial change of circumstances since the entry of the last placement order. Whether there has been a substantial change in circumstances requires a comparison of the facts at the time of the prior order to

---

[1] WISCONSIN STAT. § 767.325, "**Revision of legal custody and physical placement orders**" provides in material part:

> Except for matters under s. 767.327 or 767.329, the following provisions are applicable to modifications of legal custody and physical placement orders:
>
> **(1)** …
>
> (b) *After 2-year period.* 1. Except as provided under par. (a) and sub. (2), upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:
>
> a. The modification is in the best interest of the child.
>
> b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.
>
> 2. With respect to subd. 1., there is a rebuttable presumption that:
>
> a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.
>
> b. Continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.
>
> 3. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under subd. 1.

the present facts. ***Licary v. Licary***, 168 Wis. 2d 686, 692, 484 N.W.2d 371 (Ct. App. 1992). It requires that the facts on which the prior order was based differ from the present facts and that the difference is enough to justify the court considering whether to modify the order. ***Id.*** The "before" and "after" circumstances, and whether a change has occurred, are facts which we review under the clearly erroneous standard. ***Harris v. Harris***, 141 Wis. 2d 569, 574, 415 N.W.2d 586 (Ct. App. 1987).

¶22 Whether a change is substantial is a legal standard. ***Id.*** at 574-75. We give weight to the trial court's conclusion that a change in circumstances is substantial, but we are not bound. ***Id.***

¶23 Here, we are satisfied that the record supports the trial court's finding of a substantial change in circumstances. Barbara's numerous moves, shifts in occupations and in living arrangements changed the children's circumstances frequently. Her last move from Amery to River Falls substantially changed David's ability to exercise his placement rights.

¶24 In contrast to Barbara's frequent moves, the record reflects that David's circumstances have stabilized through his marriage, family life and occupation. Also, the psychologist noted the children's current ages and developmental needs call for greater stability in their lives. Although David's marriage is not in itself evidence of a substantial change, here it was accompanied by other factors, including Barbara's move, lack of stability and the children's ages and developmental needs. We conclude that the trial court correctly determined that the evidence demonstrated a substantial change in circumstances.

B. PRIMARY PLACEMENT MODIFICATION

¶25 Next, Barbara argues that the trial court erroneously exercised its discretion because it misapplied the controlling statutory factors. We are unpersuaded. Under WIS. STAT. § 767.325(1)(b)2, there is a rebuttable presumption that it is in the children's best interests to continue physical placement with the parent with whom they reside the greater part of the time. In reaching its decision whether to modify physical placement, "the court shall consider the factors under WIS. STAT. § 767.24(5)." WIS. STAT. § 767.325(5m). Under § 767.24(5), the court is to consider all factors relevant to the children's best interests.[2]

[2] WISCONSIN STAT. § 767.24(5) enumerates the following factors:

> (a) The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
>
> (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.
>
> (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.
>
> (cm) The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.
>
> (d) The child's adjustment to the home, school, religion and community.
>
> (dm) The age of the child and the child's developmental and educational needs at different ages.

(continued)

¶26 The determination whether to modify a placement or custody order is directed to the trial court's discretion. ***Keller v. Keller***, 2002 WI App 161, ¶6, 647 N.W.2d 426. We affirm a trial court's discretionary determination when the court applies the correct legal standard to the facts of record and reaches a rational result. ***Id.*** As a reviewing court, our task is to search the record for reasons to sustain the trial court's exercise of discretion. ***Id.*** "An appellate court must give

---

> (e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.
>
> (em) The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.
>
> (f) The availability of public or private child care services.
>
> (fm) The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.
>
> (g) Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or 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, as defined in s. 813.122(1)(a), of the child, as defined in s. 48.02(2).
>
> (i) Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20(1m) 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.
>
> (jm) The reports of appropriate professionals if admitted into evidence.
>
> (k) Such other factors as the court may in each individual case determine to be relevant.

great weight to the circuit court's determination as to custody." ***Gould v. Gould***, 116 Wis. 2d 493, 497, 342 N.W.2d 426 (1984).

¶27 A custody determination depends on first-hand observation and experience with the persons involved. ***Id.*** The trial court, not the appellate court, judges the credibility of witnesses and the weight of their testimony. *See* WIS. STAT. § 805.17(2). Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court could have but did not reach. ***In re Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the opportunity to observe witness demeanor and gauge the persuasiveness of their testimony. ***Id.*** at 151-52.

¶28 Barbara argues that the trial court "erred when making a finding that placement should be given to David C., based upon religion." We disagree that the record reflects that religion was the basis of the court's decision. Rather, the court's decision indicates that the children's adjustment to religion was one of the factors it considered.

¶29 Under WIS. STAT. § 767.24(5)(d), one factor the circuit court shall consider is "the child's adjustment to home, school, religion and community." In ***Gould***, 116 Wis. 2d at 503-04, our supreme court interpreted this section:

> The statute requires the court to consider the child's adjustment to religion; it does not require the court to consider the family's religion or to favor one parent over the other in a custody determination on the basis of the parent's attitudes toward religion or the parent's religious affiliation. Wisconsin has long respected families' rights to choose the type of religious instruction, if any, their children will receive.

¶30 The ***Gould*** case explained "courts should not purport to pass upon the comparative merits of various attitudes regarding religion" and that there was a constitutional "right to disbelieve and also the right to believe in such nontheistic creeds as Buddhism, Taoism, Ethical Culture, and Secular Humanism." ***Id.*** at 504.

¶31 Contrary to Barbara's allegations, the trial court did not base its decision on the parents' religion. The trial court pointed out it was unnecessary to determine the parties' respective religious beliefs, stating that the evidence at trial did not indicate what Barbara's religious attitudes were and, "That's up to you and we don't need to go there." The court pointed out, however, that the boys desired some religious exposure, explaining, "[b]oth boys apparently want to have some exposure to religion and are hopeful that whatever the court orders will allow for that." The court did not state a religious preference or that religious practices were determinative. Rather, the record reflects that the court's consideration was properly limited to the children's adjustment to religion and, consequently, complied with the applicable criterion. *See* WIS. STAT. § 767.24(5)(d).

¶32 Next, Barbara argues that the children's wishes were ignored. We disagree. Under WIS. STAT. § 767.24(5)(b), the court is to consider the wishes of the child. However, "the personal preference of a child is not a controlling consideration on the issue of custody unless the child gives substantial reasons why it would be against his or her best interests to award custody contrary to such expressed preference." ***Haugen v. Haugen***, 82 Wis. 2d 411, 417, 262 N.W.2d 769 (1978). In performing its discretionary function, giving consideration to various factors involves a weighing and balancing operation, and the weight to be given a particular factor in a particular case is for the trial court, not the appellate court to determine. *See* ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶33 The record demonstrates that the court considered the children's wishes, but concluded that other factors outweighed them. Under our scope of review, we are prohibited from weighing the evidence and factors to determine custody. ***Hughes v. Hughes***, 223 Wis. 2d 111, 128, 588 N.W.2d 346 (Ct. App. 1998). Because the court considered appropriate factors and reached a reasoned result, the record reflects an appropriate exercise of discretion

¶34 Next, Barbara argues that the trial court erroneously failed to consider the boys' relationships with her daughters, but unfairly mentioned their relationships with David's fourteen-month-old daughter. We conclude that Barbara fails to demonstrate an erroneous exercise of discretion. Under WIS. STAT. § 767.24(5)(c), the court is to consider the children's interaction with siblings. The record shows that at the time of trial, Barbara's daughters were ages twenty-seven, twenty-four, twenty-three, and nineteen. It was reasonable for the trial court to infer that because they were adults and not living in Barbara's household at the time of trial, they would have less consistent interaction with the two boys than David's toddler daughter. The record discloses a rational basis for the court to focus on the boys' relationship with David's daughter.

¶35 Barbara further contends the trial court failed to place significant weight on the factor that she spent more quality time with the children than David did. *See* WIS. STAT. § 767.24(5)(cm). We are unpersuaded. The court apparently believed David's testimony to the effect that Barbara was not cooperative in arranging periods of placement with him. A credibility determination is a trial court, not appellate function. WIS. STAT. § 805.17(2). The court stated that it would not fault David for spending less time with the children, in part because he needed a court order to obtain structured placement. We are prohibited from weighing the evidence and factors to determine custody. ***Hughes***, 223 Wis. 2d at

128. Because the record reflects the court's reasonable consideration of this factor, we do not overturn its decision.

¶36 Next, Barbara argues that the court erred when it found that Barbara demanded that David make written application for extra visitation, because "the facts clearly demonstrate that Barbara Z. did not require written requests for every single time that David C. wanted extra visitation."

¶37 We reject this characterization of the court's decision. The court never stated that David had to apply in writing every single time he wanted extra visitation. The court expressed its concern that Barbara's formalistic demands did not encourage or facilitate frequent contact between David and the boys. *See* WIS. STAT. § 767.24(5)(g). Because Barbara's argument mischaracterizes the court's decision, it does not persuade us.

¶38 Barbara further argues: "The evidence never supported a finding that visitation interference existed or would exist in the foreseeable future." We disagree. David testified that in the twelve months preceding trial, he was denied court scheduled placement periods once or twice and extra placement requests four or five times. He also testified that he was regularly subjected to harassing telephone calls from Barbara when he exercised placement rights. The trial court, not this court, assesses the weight and credibility of testimony. WIS. STAT. § 805.17(2). The trial court was entitled to rely on David's testimony that visitation interference existed and would likely continue.

C. DENIAL OF TELEPHONIC TESTIMONY

¶39 Barbara argues that the trial court erroneously exercised its discretion when it denied her request to have her witness testify telephonically. The witness was to provide "character testimony and landlord/tenant testimony." Barbara contends that the witness was scheduled to be on vacation during the trial, but at the last minute the vacation was cancelled and the witness was unable to secure transportation to appear at trial. Barbara claims that she demonstrated good cause to proceed with telephonic testimony.

¶40 Upon review of evidentiary issues, the question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). This court will not find an erroneous exercise of discretion if there is a reasonable basis for the trial court's decision. ***Id.***[3]

¶41 WISCONSIN STAT. § 807.13, governing telephone and audiovisual proceedings, reads in part:

> **(2)** EVIDENTIARY HEARINGS. In civil actions and proceedings, including those under chs. 48, 51, 55 and 880, the court may admit oral testimony communicated to the

[3] Also, error may not be predicated upon a ruling that excludes evidence unless the proponent demonstrates prejudice. WIS. STAT. § 901.03. Here, Barbara did not request a continuance to produce the witness at a later time; accordingly, we are not satisfied that she has demonstrated prejudice.

court on the record by telephone or live audiovisual means, subject to cross-examination, when:

(a) The applicable statutes or rules permit;

(b) The parties so stipulate; or

(c) The proponent shows good cause to the court. Appropriate considerations are:

1. Whether any undue surprise or prejudice would result;

2. Whether the proponent has been unable, after due diligence, to procure the physical presence of the witness;

3. The convenience of the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;

4. Whether the procedure would allow full effective cross-examination, especially where availability to counsel of documents and exhibits available to the witness would affect such cross-examination;

5. The importance of presenting the testimony of witnesses in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully;

6. Whether the quality of the communication is sufficient to understand the offered testimony;

7. Whether a physical liberty interest is at stake in the proceeding; and

8. Such other factors as the court may, in each individual case, determine to be relevant.

¶42 In reaching its determination, the trial court stated:

[F]irst of all, the whole idea of not having people appear by phone is … the ability to confront the witness and to ferret out their credibility is substantially diminished when they appear by phone as compared to appearing personally in court. We use telephone testimony not because it is inherently more reliable. In fact, it may be less reliable, because the finder of fact has inability to see the witness and assess credibility from that vantage point.

> … [W]e know that she isn't unavailable, that she is only 45, 50 miles away, whatever it is to River Falls, I am not going to allow telephone testimony.

¶43 The trial court acknowledged that the witness was listed and that her appearance would not result in undue surprise or prejudice. However, it was not satisfied that her failure to appear was after due diligence to procure her appearance. It was also not satisfied that there would have been a high cost or inconvenience associated with a personal appearance. The court explained that WIS. STAT. § 807.18 contemplates "whether the importance of presenting the testimony of the witness in open court where the finder of fact may observe the demeanor of the witness and where the solemnity of the surroundings will impress upon the witness to testify truthfully." *See* WIS. STAT. § 807.13(2)(c)(5). The court ruled that the witness would not be allowed to testify by telephone.

¶44 The record demonstrates that the trial court considered the appropriate factors and reached a reasoned result. The court placed significant weight on the importance of presenting the testimony in open court, where the witness's demeanor may be observed and the solemnity of the surroundings will impress upon the witness the duty to testify truthfully. *See* ***id.*** It was within the court's discretion to do so and, as a result, we will not overturn its decision.

D. Nondisclosed Expert Witness

¶45 Finally, Barbara argues that the trial court erroneously exercised its discretion when it permitted David's wife, Shayne C., to testify as an expert witness. We conclude that Barbara fails to show that she was prejudiced. Despite the court's order that the parties were to disclose witnesses before trial, David's counsel did not include her name on his original or amended witness list. David's counsel explained that the absence of Shayne's name was an oversight because,

from the posture of the case, it was obvious to all that she would be a material witness. The court apparently accepted his statement, finding:

> One of the statutory factors under 767.24(5) is the relationship that the children have with any other significant people in the same household. … [C]ertainly I am amazed that [Shayne] is not named here and I think it is probably a secretarial oversight more than anything else. I just don't see how [Barbara] is substantially or even significantly prejudiced by allowing her to testify.

¶46 The court suggested: "I will give you this remedy … [h]ave her stand down now, take her deposition tonight, then have her testify in the morning." Barbara's counsel responded: "No. I will pass on that, [J]udge."

> In ***Fredrickson v. Louisville Ladder Co***., 52 Wis. 2d 776, 191 N.W.2d 193 (1971), this court recognized that the trial court has the discretion to exclude the testimony of a witness if a party is prejudiced by opposing counsel's failure to inform him that the witness would be called. The court said two questions would be considered, first, whether the party had reason to believe the witness would be called, and second, whether the unfair surprise outweighed the probative value. The court added that excluding a witness is a drastic measure which can be avoided by giving the surprised party time to prepare. In ***Fredrickson*** the trial court gave the party time to depose the surprise witness during trial even though they moved for exclusion, not continuance. This court concluded the party had not been prejudiced.

Meurer v. ITT Gen. Controls, 90 Wis. 2d 438, 454-55, 280 N.W.2d 156 (1979). Because counsel declined the court's remedy, Barbara fails to show prejudice.

¶47 Barbara further contends that the trial court erred when it permitted Shayne to provide expert testimony. The record reflects that after Shayne testified that one of the boys lacked social skills and confidence, Barbara's counsel objected. After some discussion, the trial court directed Shayne to limit her testimony to her observations, and not testify to conclusions. Later in her

testimony, the court asked Shayne to testify to the children's maturity levels based upon her experience and training as a teacher. Barbara's counsel did not object to the question. We conclude that the record fails to disclose "a timely objection" to the questions as required under WIS. STAT. § 901.03. Consequently, we do not review the claim of error.

CONCLUSION

¶48 We conclude that the record supports the trial court's finding of substantial change in circumstances. We are satisfied that the court applied the appropriate statutory factors and that the record discloses a rational basis for its determination that it was in the children's best interests to modify physical placement. In addition, Barabara fails to show an erroneous exercise of discretion with respect to the court's evidentiary rulings.

By the Court.—Judgment affirmed.

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