**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 26, 2010**

**A. John Voelker**
**Acting 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. 2009AP1547** **Cir. Ct. No. 2001FA12**

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

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**IN RE THE MARRIAGE OF:**

**CHRISTINA M. MIHEVE,**

**PETITIONER-RESPONDENT,**

**V.**

**MICHAEL G. MIHEVE,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Reversed and cause remanded with directions*.

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

¶1 PER CURIAM. Michael Miheve appeals an order denying his motion to modify a physical placement order. He argues the circuit court erred by denying his motion without holding an evidentiary hearing. We agree and reverse.

¶2 Michael and Christina Miheve were divorced in 2002. Under the current physical placement order, during the school year, Michael and Christina's minor child resides with Michael every weekday and one weekend per month and with Christina on the other weekends. The child spends ten weeks during the summer recess and all other school vacation periods with Christina. The parties alternate placement on major holidays.

¶3 In February 2009, Michael moved to modify the physical placement order, alleging Christina had failed to exercise approximately eleven periods of weekend placement and three periods of holiday or school vacation placement between October 19, 2008 and January 31, 2009. Michael also alleged that Christina told their child she could live with Michael and that the child indicated she wanted to live with Michael full-time. Michael contended these facts constituted a substantial change in circumstances, entitling him to modification of the physical placement order. *See* WIS. STAT. § 767.451(1)(b)1.[1]

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

WISCONSIN STAT. § 767.451(1)(b)1. permits a court to modify a physical placement order after a two-year period following the final judgment has elapsed if the court finds that (1) modification is in the best interest of the child, and (2) there has been a substantial change in circumstances since the entry of the last order affecting physical placement.

At the motion hearing, Michael's attorney asserted Michael would also be entitled to relief under WIS. STAT. § 767.451(2m), which permits a court to modify a physical placement order if it finds a parent has repeatedly and unreasonably failed to exercise periods of physical placement.

¶4 At the motion hearing, Michael's attorney informed the court that Michael was prepared to present testimony. The court responded, "I'm not prepared to listen to him." The court asked Christina, "Are you having contact with your child?" She replied she had attempted to contact the child but was unable to reach her because Michael "put[] the fax machine on." The court then stated:

> I've reviewed this motion. I've reviewed this file. I've presided over this file for way too long, and I will tell you there needs to be a substantial change of circumstances in order to bring this motion before the Court. This does not constitute a substantial change.
>
> I think Mr. Miheve believes that he can achieve his social and psychological ends through this Court. It's not true. He is not invited to bring a motion without merit before this Court again.
>
> The order of the Court as it stands is in the best interests of the child, and that will remain. The motion is denied.

Michael now appeals.

¶5 We agree with Michael that the circuit court erred by denying his motion without an evidentiary hearing. It is elementary that, if a motion states grounds for relief, a court must hold an evidentiary hearing before deciding whether to grant or deny it. *See, e.g.*, ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 557, 363 N.W.2d 419 (1985); ***Datronic Rental Corp. v. DeSol, Inc.***, 164 Wis. 2d 289, 293-94, 474 N.W.2d 780 (Ct. App. 1991); ***J.F. v. R.B. and T.B.***, 154 Wis. 2d 637, 639, 454 N.W.2d 561 (Ct. App. 1990); ***Henderson v. Milex Prods., Inc.***, 125 Wis. 2d 141, 143-44, 370 N.W.2d 291 (Ct. App. 1985). This is not the sort of issue that an appellate court should have to address.

¶6 Michael's motion clearly stated grounds for relief. The affidavit attached to the motion alleged that: (1) Christina had failed to exercise multiple

periods of physical placement; (2) Christina told the child she could live with Michael; and (3) the child stated she wanted to live full-time with Michael. If true, these allegations would constitute a substantial change in circumstances.[2] However, in order to determine whether these allegations were true, the court would have had to take evidence. Because the court did not do so, it had no basis to deny Michael's motion. We therefore reverse the circuit court's order and remand for an evidentiary hearing.

*By the Court.*—Order reversed and cause remanded with directions.

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

[2] We independently decide whether a party seeking modification of an existing physical placement order has established a substantial change in circumstances. *See* ***Greene v. Hahn***, 2004 WI App 214, ¶23, 277 Wis. 2d 473, 689 N.W.2d 657.