

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP2271

Cir. Ct. No. 2007FA116

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

TIMOTHY DOHM,

JOINT-PETITIONER-RESPONDENT,

V.

PATRINA DOHM,

JOINT-PETITIONER-APPELLANT.

APPEAL from an order of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 SHERMAN, J. Patrina Dohm appeals an order granting Timothy Dohm's motion to modify a placement order regarding their daughter. Patrina argues that the circuit court failed to apply the correct legal standards,

reached a decision not supported by the facts, and was biased against her. We affirm.

BACKGROUND

¶2 Patrina and Timothy were married in 1989 and divorced in 2007. Under the placement order put in place at the time of the parties' divorce, their daughter resided primarily with Patrina during the school year and with Timothy, at a minimum, two weekends per month and one night per week. Under this order, Patrina and Timothy shared physical custody of their daughter during the summer.

¶3 At the time of their divorce, Patrina and Timothy lived across the street from one another in Ontario, Wisconsin. However, in the summer of 2008, Patrina moved with their daughter to Reedsburg, which is approximately 50 miles from Ontario. In July 2010, Timothy filed a motion to modify the physical placement order pertaining to their daughter based in part on Patrina's move to Reedsburg.

¶4 Following a hearing, the circuit court granted Timothy's motion. The court found that Timothy had established a substantial change of circumstances due to Patrina's move with their daughter to Reedsburg, which the court stated "substantially changed the relationship that both parents were able to have with the child." The court further found that a change in placement was in the daughter's best interest. In so ruling, the court gave weight to evidence that the daughter, who was thirteen at the time, wished to reside with Timothy. Thereafter, the court entered an order giving Timothy primary placement of their daughter during the school year. Patrina appeals.

DISCUSSION

¶5 Patrina challenges the circuit court’s order modifying their daughter’s placement.

¶6 WISCONSIN STAT. § 767.451(1)(b) (2009-10)¹ creates a two-step process for the circuit court to follow in determining whether to substantially modify the terms of a physical placement order entered more than two years earlier. The moving party must first show that there has been a “substantial change of circumstances since the entry of the last order ... substantially affecting physical placement.” Section 767.451(1)(b)1b. If the movant has made such a showing, the circuit court proceeds to consider whether any modification of the existing placement order would be “in the best interest of the child.” Section 767.451(1)(b)1a.

¶7 A circuit court’s decision regarding the modification of a placement order is discretionary. *Landwehr v. Landwehr*, 2006 WI 64, ¶7, 291 Wis. 2d 49, 715 N.W.2d 180. We will affirm the court’s decision if it applied the correct legal standard and reached a reasonable result. *Id.* Whether the court applied the correct legal standard is a question of law that we review de novo. *Id.*, ¶8.

¶8 Patrina challenges the circuit court’s determination that there had been a substantial change in circumstances since the entry of the last placement order. Patrina also challenges the court’s determination that modification of placement was in their daughter’s best interest. Patrina contends that in

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

determining that modification of placement was in their daughter's best interest, the circuit court failed to apply the proper legal standards, did not reach a reasonable result, and reached a decision that reflected its bias against her. We address each of Patrina's contentions in turn below.

A. *Substantial Change*

¶9 Whether there has been a substantial change in circumstances is a mixed question of fact and law. *Lofthus v. Lofthus*, 2004 WI App 65, ¶17, 270 Wis. 2d 515, 678 N.W.2d 393. The circuit court's factual findings regarding the circumstances before and after the last order affecting placement will not be disturbed unless they are clearly erroneous. *Id.* However, whether the change is substantial is a question of law that we review de novo. *Id.*

¶10 As noted above, the circuit court determined that there had been a substantial change in circumstances since the entry of the last placement order as a result of Patrina's and their daughter's move to Reedsburg, which the court found "substantially changed the relationship that both parents were able to have with [their daughter]."

¶11 Patrina argues that her move "cannot constitute a substantial change of circumstances" in part because she and Timothy contemplated that she would make such a move at the time of the last placement order. However, Patrina has not shown that any such mutual understanding became a basis of the court's original order. A substantial change in circumstances "requires that the facts *on which the prior order was based* differ from the present facts, and the difference is enough to justify the court's considering whether to modify the order." *Beaupre v. Airriess*, 208 Wis. 2d 238, 246, 560 N.W.2d 285 (Ct. App. 1997) (emphasis added; citation omitted). At the time the last placement order was entered, Patrina

and Timothy resided in close proximity to one another. It is not self-evident that the court contemplated Patrina's move in its prior order and Patrina has not provided any factual basis from which we could conclude that the court's order was based on the possibility that Patrina might move from Ontario.

¶12 Patrina also challenges the court's determination that her move had substantially changed the relationships that she and Timothy have with their daughter. She claims that contrary to the court's ruling, the move has "changed the parties' relationship with [their daughter] remarkably little." The record supports the circuit court's findings to the contrary. The evidence reflects that since Patrina's move, their daughter has had contact with her father less frequently than prior to the move, and that the days and times their daughter spends with Timothy are not consistent. The court properly found that Patrina's move to Reedsburg had substantially affected the relationship their daughter has with Timothy.

¶13 Accordingly, we affirm the circuit court's determination that there had been a substantial change in circumstances since the last placement order was entered.

B. Best Interest

¶14 Patrina contends that the circuit court erred in determining that modification of their daughter's placement was in her best interest. Patrina claims that the circuit court failed to apply the proper legal standards and reached a decision not supported by the facts.

*I. Application of the Proper Legal Standard
in Determining the Daughter's Best Interest*

¶15 Patrina argues first that the court failed to take into consideration all of the statutory factors set forth under WIS. STAT. § 767.41(5)(am) in determining that modification of the placement order was in their daughter's best interest. In all actions to modify physical placement orders, the circuit court is to consider these fourteen factors to determine what physical placement is in the best interest of the child. Patrina argues the circuit court did not consider all fourteen factors but instead considered only one factor—their daughter's preference.

¶16 The circuit court in this case did not expressly discuss all of the custody placement factors identified in WIS. STAT. § 767.41(5)(am). However, the fact that the court did not specifically address each statutory factor does not mean that it did not consider those factors. The court found that many of the statutory factors are not relevant in this case, and that in considering only the relevant factors, it found the daughter's desire to reside with Timothy to be the overriding statutory factor. It was well within the circuit court's discretion to determine that the daughter's desire to reside primarily with her father is the overriding statutory factor in this case. *See Culligan v. Cindric*, 2003 WI App 180, ¶7, 266 Wis. 2d 534, 669 N.W.2d 175 (the determination of custody and placement issues is committed to the circuit court's discretion and we will reverse only when there has been an erroneous exercise of that discretion).

¶17 Patrina argues that by treating their daughter's preference as the overriding factor, the circuit court "left the decision in the hands of a thirteen-year-old child," which was "especially egregious ... because of [their daughter's] young age and her fervent wish not to be involved in the decision." We disagree. Although the circuit court took into consideration the daughter's preference, it did

not leave the decision up to her. The court acknowledged that the daughter was uncomfortable with the idea that she would be responsible for making the decision regarding her placement and made it clear that it, not the daughter, was making the ultimate decision.

¶18 Patrina also argues that the circuit court failed to apply the presumption that the continuation of current placement is in the child's best interest. Again, we disagree.

¶19 WISCONSIN STAT. § 767.451(1)(b)2.b. provides that there exists a rebuttable presumption that “[c]ontinuing 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.” After discussing the evidence presented and explaining why it found a change in placement to be in the daughter's best interest, the circuit court stated: “So the rebuttable presumption is overcome.” We reject Patrina's assertion that the court made merely “token reference” to the presumption. The court analyzed the evidence before it, applied the appropriate legal standard, and determined that Timothy had overcome the presumption that continuing the daughter's placement with Patrina was in her best interest.²

² In a confusing and at least partially undeveloped subsection of her principal brief, Patrina seems to suggest that the circuit court erred in its placement decision because the decision rested in part on the recommendations of the guardian ad litem and expert retained by the parties, both of whom she claims were operating under the false assumption that any change in placement would be “a temporary placement modification, subject to change if it [was] not working well.” She further contends that this error was exacerbated because the court itself was under the mistaken legal view that its modification order was subject to a “truce period” barring modification for two years. However, Patrina does not develop an argument that the court misunderstood or misapplied any relevant aspect of the recommendations made to the court. She also does not support her assertion that the court based its decision on the concept that its new placement order could not be revisited as a matter of law and has not made a claim that she has been, or will be, restricted in seeking modification of the new placement order in the two years following the entry of that order.

2. Reasonable Result Under the Facts

¶20 Patrina argues that the evidence does not support the circuit court's finding that a change in placement is in their daughter's best interest. Patrina argues that the court erroneously found that the daughter "expressed a clear and consistent desire to reside primarily with her father," when the evidence instead reflects that she "vacillated in her wishes regarding her primary placement." Patrina also argues that the court's determination is "illogical" because the evidence demonstrated that their daughter was "flourishing" under the original placement schedule and that she is more readily available than Timothy to transport their daughter to various activities.

¶21 We begin by observing that Patrina has not provided this court with a citation to the record where the court found that the daughter "expressed a clear and consistent desire to reside primarily with her father." We have reviewed the court's ruling following the hearing on Timothy's motion and have found no such finding. Rather, the court found that the daughter is a "consistent, responsible, successful child of above average intelligence," who "wants the ... opportunity to live with [Timothy]," an opportunity the "the divorce has deprived her of." At the hearing, evidence was presented that the daughter wished to reside primarily with Timothy. This evidence included the testimony of Dr. Kip Zirkel, who was retained by Patrina and Timothy to conduct an evaluation of the motive behind the daughter's desire to change placement. We simply cannot say the court's finding that the daughter wished to reside primarily with Timothy is clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶22 In determining that a change in placement was in the daughter's best interest, the court acknowledged that in her current placement with Patrina, she

was doing well academically and was involved in numerous extracurricular activities. The court found, however, that *both* Patrina and Timothy had expressed a willingness to “nurture” their daughter’s talents. The court found the overriding factor in this case to be the daughter’s expressed desire to reside with Timothy, and it was well within the court’s discretion to do so. *See, e.g., Culligan*, 266 Wis. 2d 534, ¶7 (placement issues are committed to the circuit court’s discretion). Although the daughter was doing well academically in her placement with Patrina, we cannot say the circuit court erroneously exercised its discretion in determining that, in light of her expressed desire to reside with Timothy, a change in placement was in her best interest.

C. Bias by Court

¶23 Patrina argues that the court’s decision to modify placement was the result of the circuit court’s bias against her based on her religious beliefs and sexual orientation. However, we reject this argument because she has not cited this court to any evidence to support her claim of bias by the circuit court.

CONCLUSION

¶24 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

