COURT OF APPEALS
DECISION
DATED AND RELEASED

March 7, 1996

NOTICE

No. 95-1813

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

IN RE THE MARRIAGE OF:

ROBERT L. HARTZELL,

Petitioner-Respondent,

v.

PAULETTE HARTZELL, NOW PAULETTE LUKE,

Respondent-Appellant.

APPEAL from an order of the circuit court for Rock County: PATRICK J. RUDE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

VERGERONT, J. Paulette Luke appeals from an order transferring primary physical placement of her two minor children, Amanda and Joshua, to their father, Robert Hartzell, and granting joint legal custody. Luke contends that the trial court erred by: (1) failing to state in writing why its

finding relating to physical placement and legal custody is in the best interests of the children as required by § 767.24(6)(a), STATS.;[1] (2) failing to apply the factors set forth in § 767.24(5);[2] (3) relying on erroneously admitted police,

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[1] Section 767.24(6)(a), STATS., provides:

> If legal custody or physical placement is contested, the court shall state in writing why its findings relating to legal custody or physical placement are in the best interest of the child.

[2] Section 767.24(5), STATS., provides:

> In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child.... The court shall consider reports of appropriate professionals if admitted into evidence when legal custody or physical placement is contested. The court shall consider the following factors in making its determination:
>
> (a) The wishes of the child's parent or parents.
>
> (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.
>
> (d) The child's adjustment to the home, school, religion and community.
>
> (e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.
>
> (f) The availability of public or private child care services.
>
> (g) 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 of the child, as defined in s. 48.981(1)(a) and (b) or 813.122(1)(a).
>
> (i) Whether there is evidence of interspousal battery as described

sheriff and human services agency reports; (4) refusing to admit the reports of a psychologist and a social worker retained by her; and (5) denying her request for contribution toward her attorney fees and requiring that she pay fifty percent of the guardian ad litem fees.

We conclude that the record supports the trial court's determination that there was a substantial change of circumstances since the last order affecting the children's custody and physical placement. However, the trial court erroneously exercised its discretion in failing to order a legal custody and physical placement investigation and, as a result, there was insufficient evidence from which to determine whether it was in the children's best interests to modify the prior order. The trial court also erroneously exercised its discretion when it admitted the entire contents of all the police, sheriff and human services agency reports. We therefore reverse and remand for further proceedings. We affirm the ruling on attorney fees but reverse and remand on the issue of guardian ad litem fees. We do not decide the issue regarding the psychologist and social worker reports.

BACKGROUND

Luke and Hartzell were divorced on February 17, 1986. The judgment of divorce entered by the Rock County Circuit Court provided that Luke have the care, custody and control of the parties' two children, Amanda, born November 25, 1982, and Joshua, born August 4, 1984. The judgment also provided that Hartzell have visitation every other weekend, certain holidays, and at other reasonable times on reasonable notice.[3] On August 30, 1994,

(..continued)

under s. 940.19 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.

(k) Such other factors as the court may in each individual case determine to be relevant.

[3] Under statutory amendments since the entry of the 1986 order, the definition of custody has changed. The terms "joint legal custody" and "legal custody" are now defined in § 767.001(1) and (2), STATS. The term "physical placement" is now used instead of

Hartzell moved the court to grant him primary physical placement of the children and joint legal custody. His affidavit asserted that Luke was presently on probation and was engaged in a lifestyle that was detrimental to the best interests of the children. Hartzell requested that the Rock County Department of Social Services perform a custody investigation and that a guardian ad litem be appointed. At the time of the motion, Luke lived with her children in Reedsburg in Sauk County, and Hartzell lived in Rock County.

The minutes from a hearing held on September 19, 1994, state that the court ordered that a guardian ad litem be appointed and that a custody/placement investigation[4] be conducted by the Departments of Human Services of Rock and Sauk Counties. The trial court entered a written order

(..continued)
"visitation." "Physical placement" is defined in § 767.001(5). Using current terminology, the 1986 order granted Luke sole legal custody and primary physical placement. The term "custody" in this opinion refers to legal custody as defined in § 767.001(2). The term "placement" refers to physical placement as defined in § 767.001(5).

[4] The parties and the court often use the term "home study" to refer to an investigation under § 767.11(14)(a), STATS. That statute provides in pertinent part:

> A county or 2 or more contiguous counties shall provide legal custody and physical placement study services. The county or counties may elect to provide these services by any of the means set forth in sub. (3) with respect to mediation. Regardless of whether a county so elects, whenever legal custody or physical placement of a minor child is contested and mediation under this section is not used or does not result in agreement between the parties, or at any other time the court considers it appropriate, the court may order a person or entity designated by the county to investigate the following matters relating to the parties:
>
> 1. The conditions of the child's home.
>
> 2. Each party's performance of parental duties and responsibilities relating to the child.
>
> 3. Any other matter relevant to the best interest of the child.

We use the term "custody/placement investigation" in this opinion to refer to an investigation as described in § 767.11(14)(a), STATS.

appointing a guardian ad litem, but did not enter a written order for a custody/placement investigation. The court explained in later correspondence to the parties that it was not ordering a custody/placement investigation because it had left this up to the guardian ad litem, and the guardian ad litem had advised the court that a custody/placement investigation was not necessary.

Before trial, the guardian ad litem submitted a report relating the results of an investigation she had conducted. She interviewed Luke, Hartzell, Hartzell's live-in friend Lynn, and the two children. She also reviewed records from the Janesville Police Department, the Reedsburg Police Department, the Rock County Sheriff's Department, the Sauk County Sheriff's Department, and the Sauk County and Taylor County Departments of Human Services. She concluded that there had been a substantial change of circumstances since the last order of custody and placement and that it would be in the best interests of the children for their father to have primary physical placement and the parents to have joint legal custody.

At the trial, Hartzell, Lynn and Hartzell's mother testified. Luke did not testify. Luke's witnesses were her mother, Robert Hart (Luke's live-in friend), Luke's sister, Jeffrey Semenas, a certified independent clinical social worker, and Dr. Robert Barahal, a licensed psychologist. Semenas and Dr. Barahal were retained by Luke.

The trial court excluded the reports prepared by Semenas and Dr. Barahal. The court, over Luke's objection, admitted reports from the Taylor County Department of Human Services, the Sauk County Sheriff's Department, the Sauk County Department of Human Services, the Reedsburg Police Department and the Rock County Sheriff's Department.

The trial court determined that there had been a substantial change in circumstances since the entry of the last order regarding the children's custody and placement; the evidence overcame the rebuttable presumption that it was in the children's best interests to have their custody and placement remain as set forth in the last order; and it was in the children's best interests for their parents to have joint legal custody and their father to have primary

physical placement, with specified periods of placement on alternate weekends and certain holidays with their mother.

When we denied Luke's request for relief pending appeal, we stated that we would expedite the briefing schedule and take the case under immediate submission upon completion of the briefs. Through inadvertence, we did not take the case under immediate submission upon completion of the briefs. We regret this, because we recognize the importance of a prompt resolution of disputes concerning the placement of children.

SUBSTANTIAL CHANGE IN CIRCUMSTANCES

More than two years having passed since the divorce order was entered, the trial court had discretion to grant Hartzell's motion if primary physical placement with him and joint legal custody were in the best interests of the children and there was a substantial change of circumstances affecting placement and custody since the divorce. Section 767.325(1)(b)1, STATS. The presumption is that it is in the best interests of the children to continue physical placement with the parent with whom they reside the greater part of the time and to continue the current allocation of decision-making under the current custody order. Section 767.325(1)(b)2. Whether to modify custody and placement is within the trial court's discretion. ***In re Stephanie R. N.***, 174 Wis.2d 745, 765-66, 498 N.W.2d 235, 241 (1993). We review a discretionary decision to determine if the court examined the facts of record, applied the proper legal standard and, using a rational process, reached a reasonable conclusion. *See* ***id.*** at 766, 498 N.W.2d at 242.

We first consider whether there was a substantial change of circumstances since the divorce affecting custody and placement. This determination involves a comparison of the facts at the time of the prior order to the present facts. ***Licary v. Licary***, 168 Wis.2d 686, 692, 484 N.W.2d 371, 374 (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's 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, 588-89 (Ct. App. 1987). Whether a change is substantial is a legal

standard. We defer to the trial court's conclusion that a change in circumstances is substantial, but we are not bound. ***Id.*** at 574-75, 415 N.W.2d at 589.

The trial court found that there was a substantial change in circumstances but did not set forth the facts upon which it relied. We may review the record to determine if there are facts that support this determination. *See* ***Delchambre v. Delchambre***, 86 Wis.2d 538, 541, 273 N.W.2d 301, 303 (1979). We conclude that there are.

Hartzell testified that he lived with his wife, Lynn, his son from his second marriage, and Lynn's two children. There was evidence that Luke was on probation since March 1994 for a drug-related offense. Since her divorce from Hartzell, Luke had had one marriage and relationships with a number of other men who lived with her and the children; and the men were either involved with drugs, drank excessively, or abused Luke. People "hanging around" Luke's house had used drugs. Luke now lives with a man who has been steadily employed, is not involved with drugs, does not abuse alcohol and is not abusive to Luke. Semenas testified that Luke's home is more stable than it has ever been and that Luke is seeing a therapist and her children have attended sessions with her.

This evidence is sufficient to support a finding that circumstances have changed since February 17, 1986. We conclude that these changes are substantial. They are significant enough to the lives of the children to warrant a court's consideration of whether it is in the best interests of the children to modify the prior order. The evidence that Luke's home life had recently stabilized, while relevant to the best interests determination, does not alter our conclusion. The changes in the households and the significant relationships of each parent, and Luke's probation for a drug-related offense, justify the court's consideration of modification of the prior order.

CUSTODY/PLACEMENT INVESTIGATION AND BEST INTERESTS

We next address the trial court's decision not to order a custody/placement investigation because that decision affects most of Luke's remaining arguments. Section 767.11(14)(a), STATS., provides that whenever a

child's legal custody or physical placement is contested and mediation has not resulted in agreement, the court may order a person or entity designated by the county to investigate the conditions of the child's home, each party's performance of parental duties and responsibilities relating to the child, and any other matter relevant to the best interest of the child. The person or entity investigating the parties is to submit the results of the investigation to the court, which is to make the results available to both parties. Section 767.11(14)(b). "The report shall be a part of the record in the action unless the court orders otherwise." ***Id.***

A trial court need not order an investigation in every custody and physical placement dispute. The term "may" means that it is within the trial court's discretion to do so. *See* ***Dennis v. Bayfield County Cir. Ct.***, 161 Wis.2d 644, 652, 468 N.W.2d 736, 739 (Ct. App. 1991). When a decision is discretionary, the court must undertake a reasonable inquiry and examination of the facts as the basis for its decision. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982). We will affirm the trial court's decision if the record shows that discretion was, in fact, exercised and a reasonable basis exists for the trial court's decision. ***Id.*** Failure to exercise discretion is an erroneous exercise of discretion. ***Id.*** at 471-72, 326 N.W.2d at 732.

The trial court delegated to the guardian ad litem the decision of whether a custody/placement investigation was necessary.[5] While the court may consider the recommendation of the guardian ad litem in making this decision, the court must exercise its own discretion in making the final decision. The trial court here did not do that. Its only explanation for not ordering a

[5] The record does not indicate at what point, after the September 19, 1994 hearing, the court decided to leave the question of a custody/placement investigation up to the guardian ad litem. Nor does the record indicate how counsel were first informed of the trial court's decision to do this. However, after the guardian ad litem's report was filed on December 7, 1994, Luke's new counsel requested a court-ordered investigation under § 767.11(14), STATS. When the trial court denied the request, stating that it had left this decision up to the guardian ad litem and she had determined it was unnecessary, Luke moved for reconsideration of the denial. In the motion for reconsideration, Luke pointed out that there was little information in the guardian ad litem's report about Hartzell and that it was in the best interests of the children that the court have evidence of the suitability of both homes. We do not find a ruling by the court on this motion.

home study was that the guardian ad litem decided it was not necessary. This does not constitute an exercise of discretion by the trial court.

When a trial court fails to exercise its discretion, we may remand to permit the trial court to do so. ***Hartung v. Hartung***, 102 Wis.2d 58, 69, 306 N.W.2d 16, 22 (1981). In this case, we think the better course is to examine the record to determine whether the record supports a decision that the custody/placement investigation was unnecessary. We conclude that the record does not support that decision. We also conclude that the failure to order a custody/placement investigation resulted in insufficient evidence from which to make a determination of the best interests of the children.

The evidence supports findings that Hartzell's household provided a more stable, disciplined environment and more strongly demonstrated a work ethic than did Luke's household. There was also evidence that some of Luke's conduct and associations had not been in the children's best interests, although, as we discuss below, some of this evidence was improperly admitted. While the conduct, lifestyle and values of each parent are relevant to a determination of the children's best interests, the relationship of the children to each parent and siblings and others with whom they live at each home is also a factor in determining the best interests of the children, as is the children's adjustment to the home, school, religion and community. Section 767.24(5)(c) and (d), STATS. In the case of a change in primary physical placement, the attachment to the parent and others with whom the children are presently residing and to that school and community, and the effect of the change on the children, are significant concerns.

Apparently, both the trial court and the guardian ad litem considered that the guardian ad litem could adequately gather all the relevant information and evaluate it in order to reach a recommendation. However, the role of the guardian ad litem is not that of a fact-finder. ***Hollister v. Hollister***, 173 Wis.2d 413, 419, 496 N.W.2d 642, 645 (Ct. App. 1992). A guardian ad litem's report should not contain factual information that is not part of the record. ***Id.*** at 420, 496 N.W.2d at 645. The position and observations of the guardian ad litem are not evidence. ***In re Stephanie R. N.***, 174 Wis.2d at 774, 498 N.W.2d at 245. Thus, the guardian ad litem's observations and conclusions in her report about the children's ability to adjust to living with their father, their relationships with their father's wife and the three children in their father's

home, and their father's relationship with his wife, are not evidence that the court can rely on in determining the children's best interests.[6]

The gap in the evidence resulting from the absence of a custody/placement investigation is illustrated by an examination of the testimony of Semenas and Dr. Barahal. The trial court said their testimony was incomplete because neither had interviewed or examined Hartzell or his family and friends. That is precisely one of the values of a court-ordered custody/placement investigation--it is based on interviews and information concerning both parties so that a meaningful comparison may be made. In the absence of a custody investigation, because Luke chose to retain experts and Hartzell did not, there was evidence about Luke's psychological health, her relationship with her children, the children's attachment to her, and no corresponding information concerning Hartzell.

In light of Dr. Barahal's testimony, the absence of such evidence regarding Hartzell is particularly troubling. Dr. Barahal testified that Amanda and Joshua were strongly attached to Luke's two younger children and that being in a different home without those two children would be emotionally traumatic for them; that the children are more strongly attached to their mother than to Hartzell; that there are significant conflicts in the children's feelings about the other people in their father's home, namely their stepmother and step-siblings; that Luke does not suffer from significant characterological problems in spite of many aspects of her history; and that, taking as true all the negative information about Luke in the guardian ad litem's report, it would be highly traumatic for the children to move from their mother's home to their father's home. Dr. Barahal stated these opinions to a reasonable degree of scientific certainty.

Dr. Barahal also testified that because he had not met Hartzell, he could not say whether the move was nevertheless in the children's best interests; or whether the father was so much a better parent that the children would benefit in the long run. He believed moving the children to Hartzell's

[6] We do not intend to fault the quality of this guardian ad litem's work or her conscientiousness in acting as an advocate for the children. We intend, rather, to clarify the role of the guardian ad litem, recognizing that the role is not always well-defined. *See* ***Hollister v. Hollister***, 173 Wis.2d 413, 418, 496 N.W.2d 642, 644 (Ct. App. 1992).

home was taking "a real chance of screwing these kids up badly." He could not say whether that risk was worth taking because he did not know Hartzell; but he urged caution in making a major change in the children's lives. He found nothing in his examination indicating that the children had been psychologically harmed by living with their mother.

The trial court found:

> I have also considered the fact that any change of primary placement can be upsetting and unsettling to the children. Nevertheless, I find that these children should be able to adapt to a change of primary placement without too much difficulty based on the evidence in this case.

However, no evidence supports this finding. The guardian ad litem's observations and conclusions are not evidence. Nor is evidence that the trauma to the children of leaving their mother's home is, nevertheless, in their best interests because of the benefits to them of being in their father's home. The evidence of Hartzell's lifestyle and values is significant, but there is little or no evidence concerning his relationship with his children and his parenting abilities, and little evidence on the children's relationship with others in their father's household.

There is also little evidence of the children's adjustment to their school and community. The trial court excluded Semenas' report and did not permit him to testify concerning conversations with the children's teacher and their therapist. Dr. Barahal testified that Joshua had developmental difficulties and, possibly, seizures but his report, which discusses this in more detail, was excluded.[7] These are all issues that a court-ordered custody/placement investigation could have addressed.

We conclude that we must reverse the trial court's order granting joint legal custody and primary physical placement with Hartzell, and remand

[7] We discuss the admissibility of these reports later in the opinion.

with directions to order a custody/placement investigation and such further proceedings as appropriate. The trial court should also consider whether a court-ordered psychological evaluation of the parties or the children is necessary. In view of the importance to the children and parents of resolving this issue promptly, we direct the court on remand to proceed expeditiously so that the primary placement of the children is decided, at the latest, before school begins in the fall of 1996.

Because the issue of the proper time for determining the children's best interests on remand may arise, we address that now. We cannot put the parties and the children back in the position they were in when this dispute was tried on April 6, 1995. The children have presumably been residing with their father since about June 6, 1995. The custody/placement investigation and any new testimony the court hears should assess the children and parties as they are at the time of the proceedings on remand, not as they were at the trial in April 1995. We conclude that the standard for modifying custody and physical placement under § 767.325(1)(b), STATS., must, under these circumstances, be altered somewhat.

Section 767.325(1)(b), STATS., shows the legislature's intent to minimize disruption to the child's life by discouraging repeated litigation of custody and placement orders. It does this in two ways: (1) there must be a substantial change in circumstances since the entry of the last order, and (2) there is a rebuttable presumption in favor of continuing the current allocation of decision-making and continuing the child's physical placement with the parent with whom the child resides the greater part of the time.

However, § 767.325(1)(b), STATS., contemplates the typical situation where the child's primary placement is with the *non-moving* party, consistent with the terms of the order sought to be modified. This does not fit the facts before us. Here the children reside with the *moving* party pursuant to an order that we have reversed.

Considering the purpose of § 767.325(1)(b), STATS., it makes no sense to apply a rebuttable presumption that it is in these children's best interests to "continue" to reside primarily with Luke, since they are not doing so now. On the other hand, we are not willing to invest the arrangements under

the order we reverse with that presumption. Therefore, on remand the court should not apply a presumption in favor of either party.

The reasoning that supports this modification of the standard on remand also supports our conclusion that the children should remain primarily placed with their father until the court determines their primary physical placement after remand, unless the court determines that another interim arrangement is in the children's best interests. The goal here is to minimize the disruption to the children's lives while the proceedings on remand take place.

EVIDENTIARY ISSUES

Because the admissibility of the police, sheriff and social services reports is an issue that may arise on remand, we address that now. Luke contends that the police, sheriff and social services reports were improperly admitted. She acknowledges that the hearsay exception for public records applies, § 908.03(8), STATS., but she contends that the exception renders admissible only the parts which the maker of the report could testify to if present in court. We agree. If the report contains an additional level of hearsay, the report must be examined to determine whether an exception applies to that level of hearsay. ***Mitchell v. State***, 84 Wis.2d 325, 330, 267 N.W.2d 349, 352 (1978). If it does not, that portion of the report must be excluded. ***Boyer v. State***, 91 Wis.2d 647, 661, 284 N.W.2d 30, 35 (1979).

While the decision to admit or exclude evidence is discretionary, it must be made in accordance with the proper legal standards. ***State v. Weber***, 174 Wis.2d 98, 106, 496 N.W.2d 762, 766 (Ct. App. 1993). The trial court admitted all the reports offered by Hartzell, over Luke's objection, without analysis of each report. The trial court relied on certain reports. The court refers in its findings to "police calls" and to other incidents related in the reports. But the court did not state what reports, or what portions of the reports, it relied on.[8] Certain portions of certain reports are admissible and therefore could

[8] The trial court stated that it was incorporating all the facts in Hartzell's brief as its findings, and the factual allegations in the guardian ad litem's reports. Those documents discuss various reports. This makes it even more difficult to determine whether the court relied on admissible portions of the reports. A trial court does not properly exercise its discretion when it adopts the position and findings of a party without stating the factors it relied on in deciding to do so. *See* ***Trieschmann v. Trieschmann***, 178 Wis.2d 538, 544, 504

properly be relied on by the trial court, but we decline to rule on the admissibility of the contents of each report, because the trial court has not yet done so and the matter is being remanded on other grounds. On remand, the trial court should consider the admissibility of each report offered by Hartzell and rule on Luke's objections to the contents of each.

Luke also argues that the trial court erroneously denied admission of Semenas' and Dr. Barahal's reports. Resolution of this issue is related to whether Semenas and Dr. Barahal are experts in the areas in which they offered testimony. Whether a witness qualifies as an expert is a matter within the trial court's discretion, ***State v. Robinson***, 146 Wis.2d 315, 332, 431 N.W.2d 165, 171 (1988), as is the question whether to admit an expert's opinion pursuant to § 907.02, STATS. ***State v. Blair***, 164 Wis.2d 64, 74-75, 473 N.W.2d 566, 571 (Ct. App. 1991). An expert witness may at trial read into evidence any report that the witness prepared, except matter in the report that would not be admissible if the expert testified orally. Section 907.07, STATS.

We do not know whether Semenas or Dr. Barahal will testify on remand, since there will be a court-ordered custody/placement investigation and there may be a court-ordered psychological evaluation. If either one or both do testify, that testimony will address circumstances at the time of the remand. Because of the death of the judge who has presided over this case, a new judge will hear the case on remand. The successor judge will not be bound by his or her predecessor's rulings on the admissibility of expert opinion testimony or reports. *See* ***Starke v. Village of Pewaukee***, 85 Wis.2d 272, 283, 270 N.W.2d 219, 224 (1978) (successor judge may modify or reverse rulings of predecessor if it does not require a weighing of testimony given before the predecessor and so long as predecessor would have been empowered to make the modifications). For these reasons we do not decide the issues relating to the admissibility of Semenas' and Dr. Barahal's reports.

ATTORNEY FEES, COSTS AND GUARDIAN AD LITEM FEES

The trial court denied Luke's motion for a contribution toward her attorney fees and costs on the ground that the custody dispute was precipitated by Luke's unilateral decision to deny Hartzell visitation at the appropriate times

(..continued)

N.W.2d 433, 435 (Ct. App. 1993).

and places. The court also determined that the guardian ad litem fees should be divided equally. Luke contends that the trial court erred because she does not have the ability to pay these fees and costs and Hartzell does.

Section 767.262(1)(a), STATS., provides that a court may, after considering the financial resources of both parties, order either party to pay a reasonable amount for the costs to the other party, including attorney fees, of maintaining or responding to an action affecting the family. This statute means that a court may not order contribution without considering the financial resources of the parties. This statute does not mean that a court *must* order contribution if one party has greater income; rather, a court *may* do so.

The trial court declined to order contribution because it found that Luke's denial of Hartzell's visitation rights precipitated Hartzell's motion to change custody and physical placement. It is reasonable to infer from the evidence that this is one factor prompting the motion. Hartzell testified concerning Luke's failure to permit the children to see him at the scheduled times on various occasions before he filed the motion. Luke did not testify. It was reasonable for the court, in deciding whether to award a contribution, to take into account Luke's conduct in denying Hartzell's visitation rights.

However, we are unable to determine why the court ordered an equal division of guardian ad litem fees. Under § 767.045(6), STATS., the court has the discretion to apportion the fees between the parties and to order that the county pay part or all if either party is unable to pay. Because of the reference to "unable to pay," we read this statute to require that the court consider each party's ability to pay in deciding how the guardian ad litem fees are to be paid. On remand, the court should direct the manner of payment of guardian ad litem fees after considering each party's ability to pay.

SUMMARY

On remand, the court shall order a custody/placement investigation and consider whether to order a psychological evaluation of the parties or the children. After the investigation is completed, the court shall conduct a hearing to determine whether primary placement with Hartzell and joint custody is in the best interests of the children. The court shall rule, consistent with this opinion, on the admissibility of each police, sheriff and

human services agency report, or portion thereof, that is offered by Hartzell and objected to by Luke. The court shall determine the manner of payment of the guardian ad litem fees after consideration of the parties' financial circumstances.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

No. 95-1813(CD)

SUNDBY, J. (*concurring in part; dissenting in part*). I agree that we must reverse the order awarding the parties joint legal custody and transferring primary physical placement of Amanda and Joshua from their mother to their father, Robert. The order amended a 1986 judgment. I do not agree, however, that we can, or should, allow Robert to retain the fruits of the trial court's error by leaving the children with him. When we reverse a trial court order changing physical placement, the judgment or previous order controls.

Amanda is approximately thirteen and one-half and Joshua will be twelve in August. By the time the investigations which should have been done are done after remand and the trial court decides Robert's motion, and the trial court's decision is appealed, and review by the supreme court is sought, with the possibility of a further reversal, these children may no longer be minors. We will have a repeat of the tragedy in ***In re Paternity of S.R.N.***, 167 Wis.2d 315, 481 N.W.2d 672 (Ct. App. 1992), *aff'd*, 174 Wis.2d 745, 498 N.W.2d 235 (1993), where a twenty-month old child was wrongfully taken from her mother by court order and given to her father. By the time this wrong was righted, the child had been with the father approximately five-and-one-half years and a new trial court concluded that continuing the custody and physical placement arrangement was now in the best interest of the child.

I fault the legislature and the courts equally for allowing these tragedies to occur. I urge the legislature to enact emergency legislation providing that a child shall not be removed from his or her home until an order having such effect has become final after all judicial remedies are exhausted, except where a child is being physically or sexually abused. I also urge the legislature to provide that any order having such effect shall be immediately appealable and shall be heard forthwith by the court of appeals. It is time that the courts and the legislature put a stop to allowing "the courts ... to be battlefields where wounded parents turn their children as weapons against one another." ***S.R.N.***, 167 Wis.2d at 343, 481 N.W.2d at 684.

I have no sympathy at all for the father in this case. He loved Amanda and Joshua so much that he refused to pay court-ordered child support and was twice ordered to show cause why he should not be found in contempt for failing to pay such support; regarding the second order to show cause, he was found in contempt of court. Moreover, as of August 11, 1992, he was $9,683.69 in arrears in child support. I question the sincerity of his effort to

now obtain primary care and placement of the children. It is likely that he is motivated primarily by his disinclination to pay child support.

Robert relies on Paulette's chaotic lifestyle. However, he did not present any evidence that the mother's lifestyle had any adverse affect upon the children. That is necessary. *See* ***S.R.N.***, 167 Wis.2d at 338-39, 481 N.W.2d at 682. The mother, however, presented reports by a licensed psychologist and the Sauk County Human Services social worker that the children "much preferred" to live with their mother and resented their father and his efforts to interfere with their relationship with their mother. Amanda told the psychologist that she would like to "make all this court stuff stop and just live with my mother." In a hypothetical life boat, Joshua told the doctor that he would include his father only if there "was a lot more room." The children blame their father for most of the fighting between him and their mother.

The psychologist concluded that a change of physical placement would be traumatic for the children.

The father had the burden to show that a change of physical placement and legal custody was in the best interest of the children. He made almost no effort to carry that burden.

Under § 767.325(1)(b)2, STATS., the father was faced with a rebuttable presumption that continuing the children's physical placement with their mother was in their best interest. He did not overcome that presumption. We propose to give him a second chance. I have always thought that if a litigant had a burden to carry and failed to carry it, he or she had had their day in court and that was the end of the matter. Further, because of the trial court error caused by the father's failure to make his case, we now propose to abolish

the rebuttable presumption because the children have been placed with him wrongfully since the court entered the order which we now review.

I urge the supreme court to give this case its immediate attention and prevent, if it is not already too late, the trauma to the children caused because Robert has used them in his bitter contest with his former wife. We take away children's stability in their homes and get tough with them when they find outlets for their anger in delinquent acts.

For these reasons, I dissent.