WISCONSIN COURT OF APPEALS
DISTRICT 4

Appeal No. 2011AP002271

Circuit Court Case No. 2007FA000116

In re the Marriage of:

Timothy Dohm,

Joint-Petitioner-Respondent,

v.

Patrina Dohm,

Joint-Petitioner-Appellant.

Joint-Petitioner-Appellant's Brief and Appendix

On appeal from the Circuit Court for Vernon County, the Honorable Michael J. Rosborough presiding.

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May the trial court modify placement of a child solely on the basis of the child's wishes, without considering other factors or weighing the continuity presumption? Answered by the trial court in the affirmative.

Did the minor child express a clear and consistent desire to change her primary placement from her mother to her father? Answered by the trial court in the affirmative.

Was the modification based on an incorrect assumption that the modification would be temporary? Answered by the trial court in the negative.

Did bias affect the decision? Answered by the trial court in the negative.

Was there a substantial change of circumstances since entry of the previous order affecting placement? Answered by the trial court in the affirmative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as it is anticipated that the briefs will fully develop and meet the issues.

The decision may be appropriate for publication as it may clarify existing rules of law concerning the legal standards for modification of physical placement orders.

STATEMENT OF THE CASE

In this post-judgment divorce action, the circuit court for Vernon County granted Joint-Petitioner-Respondent Timothy Dohm's motion for modification of physical placement. Joint-Petitioner-Appellant Patrina Dohm appeals that decision.

Timothy and Patrina Dohm were married in 1989 and divorced in 2007. R.11. Of their three children, only Karissa is still a

minor (born December 2, 1997), and is the subject of this post-judgment litigation. R.11.

Pursuant to the Judgment of Divorce and Marital Settlement Agreement entered on March 4, 2008, Patrina had primary placement of Karissa during the school year, and Timothy had placement two weekends per month, one overnight per week, and shared summer placement. R.9. At the time of the divorce both parties resided in the small community of Ontario, Wisconsin, but Patrina was making plans to move with Karissa. R.54 p.83; R.58 pp.174, 199. In the summer of 2008 Patrina and Karissa moved about fifty miles from Ontario, to Reedsburg, and Karissa enrolled in the fifth grade in the Reedsburg school district at the start of the 2008-2009 school year. R.54 pp.23-24.

On May 18, 2010, the Vernon County Child Support Agency notified Timothy by letter of a proposed increase in his child support payments. R.32; R.54 pp.73-74. Three days later, Timothy signed an affidavit in support of a motion to modify placement. R.14. Timothy's child support was increased following a hearing. R.19.

In June 2010 Timothy remarried. R.54 p.16. On July 22, 2010, Timothy filed his motion to modify placement. R.13. On August 4, 2010, the court appointed a guardian ad litem. R.18.

On October 12, 2010, following several hearings, the Vernon County Family Court Commissioner entered an order granting Timothy primary placement, effective later that year. R.26, 33. On November 5, 2010, Patrina requested de novo review. R.23.

On December 20, 2010, the guardian ad litem wrote the court with her "recommendations and suggestions." R.64. She stated in her letter that the child "has vacillated regarding where she prefers to live;" requested that the court appoint an expert, Dr. Kip Zirkel, to conduct a "motivation evaluation;" and requested that the de novo hearing be rescheduled until after Zirkel completes his motivation evaluation. R.64.

On December 29, 2010, the circuit court held a de novo hearing. R.54. Following testimony, the parties reached an

agreement for a temporary order continuing Karissa's primary placement with Patrina. R.54 p.102. The resulting Temporary Order, entered on February 21, 2011 nunc pro tunc December 29, 2010, vacated the order of the Family Court Commissioner; continued primary placement with Patrina; and appointed Dr. Kip Zirkel "to complete a motivational evaluation at the request of the Guardian Ad Litem." R.33.

On June 2, 2011, Patrina moved to modify placement and to dismiss Timothy's modification motion. R.34, 35.

The court heard two days of testimony on the placement modification motion on June 10 and June 13, 2011. R.58, 60. The court also took judicial notice of the testimony and exhibits from the de novo hearing "so we don't have to re-testify to things that are already previously testified." R.58 pp.26-28. The guardian ad litem presented no evidence but, following testimony, recommended that primary placement be awarded to Timothy for a trial period of a year. R.60 pp.310-319.

Following the June 13, 2011, hearing, the court stated on the record its decision to grant Timothy primary placement of Karissa. R.60 pp.335-342; A-App. pp.101-103. The resulting written order, entered on August 12, 2011, sets forth the new placement schedule but contains no rationale, analysis of the evidence, or explanation for the court's decision. R.46. Thus the basis for the court's decision can be found only in it oral decision made on the record on June 13, 2011. R.60 pp.335-342; A-App. pp.101-103.

Timothy filed Notice of Entry of Order on August 24, 2011. R.47. Patrina filed Notice of Appeal on September 26, 2011. R.49.

ARGUMENT

I. BY BASING ITS PLACEMENT MODIFICATION DECISION ON THE CHILD'S WISHES, RATHER THAN ON AN ANALYSIS OF THE BEST INTEREST FACTORS, THE TRIAL COURT APPLIED AN INCORRECT LEGAL STANDARD.

The legal standard for Timothy's placement modification motion is clearly defined by statute. In addition to finding a substantial change of circumstances (addressed below), the court must find that modification is in the child's best interest by analysis of seventeen specific factors. The court "shall consider all facts relevant to the best interest of the child. . . . [and] shall consider the following factors in making its determination." Wis. Stat. §767.41(5). Further, "in all actions to modify . . . physical placement orders, the court *shall* consider the factors under s. 767.41(5)(am)." Wis. Stat. § 767.451(5m) (emphasis added).

This court reviews de novo whether the trial court applied the correct legal standard: "We give deference to the circuit court's decisions regarding the modification of placement under an erroneous exercise of discretion standard of review, and affirm the circuit court's decisions when the court applies the correct legal standard and reaches a reasonable result. Whether the circuit court has applied the correct legal standard is a question of law reviewed de novo." *Landwehr v. Landwehr,* 2006 WI 64, ¶¶ 7, 8, 291 Wis.2d 49, 715 N.W.2d 180 (citations omitted).

A. The trial court committed an error of law by basing its decision on a single factor and ignoring the evidence regarding all other factors.

The trial court failed to comply with the legislatively mandated legal standard of analyzing the statutory factors to evaluate Karissa's best interests. Instead, while the court made token reference to the statutory factors, it explicitly based its decision on a single factor – the wishes of the child – and expressly disregarded all other factors and the evidence presented on them.

In its oral decision the court stated repeatedly that Karissa's wishes were essentially the only relevant evidence. The court stated that Karissa's "wishes are the overwhelming and controlling factor." R.60 p.340; A-App.102. Preceding this statement, the court dismissed all the other factors:

> [T]his list of factors is all well and good and the court has considered these [sic] are other factors there that

> are relevant to this decision. A lot of them aren't. And I've emphasized what I think are the relevant factors. And far and away, the most important factors as to this child – we're talking about this child, not some theoretical or hypothetical child – as to this child, this family – or families, I should say – her wishes are the overwhelming and controlling factor.

Id. Regarding Dr. Kip Zirkel, who provided evidence only on the issue of where Karissa wanted to reside and why, the court stated, "the most important evidence, the evidence upon which I probably could have decided this case, is Dr. Zirkel's testimony." R.60 p.337; A-App.101.

The court stated, "I've emphasized what I think are the relevant factors," R.60 p.340; A-App.102, yet it uttered not a single word about the other factors it claimed it emphasized, or the evidence presented on them. Reading the court's decision from start to finish demonstrates how perfunctory and empty were its references to the factors.

If the court's statements leave any question whether the court considered any other evidence or evaluated any other factors, the court's comments concerning the rest of the evidence erase any doubt. The court heard a full day and two partial days of testimony on this placement modification motion, including evidence regarding Karissa's educational needs, her adjustment to home and school, her relationship with each parent and with others in the homes, and her parents' ability to communicate and to foster the other parent's relationship with her. *See, e.g.,* R.58 pp.78, 99, 178, 255. Yet the court dismissed the extensive evidence regarding the factors. The court called this dispute and the attendant litigation "ridiculous," called it an "obscene" waste of resources, stated that "considering the nature and the scope of the issue, I can't think of a more ridiculous case in 25 years," stated that "triviality is probably the primary word that – that characterizes this entire proceeding." R.60 pp.335, 36, 37; A-App.101.

The trial court did have assistance ascertaining the nature and validity of Karissa's wishes. At the guardian ad litem's request, Dr.

Kip Zirkel interviewed Karissa and her parents and offered his opinions regarding her wishes and her reasons therefor. R.58 pp.30-32. Patrina does not dispute that Zirkel's self-described "motive evaluation" might provide the trier of fact with useful information in an appropriate case. But it cannot provide the dispositive evidence because the court's mandate – determining Karissa's best interests within the framework of the statutory factors – is much broader than the question what Karissa wants and why she wants it. Even Zirkel recognized that his evidence had a limited role: "Q ... you're clear that you cannot recommend one parent's placement over the other. Is that right? A: That's correct." R.58 p.66.

As the caselaw reflects, the trial court's evaluation and analysis of *all* relevant statutory factors is not simply an underlying framework for the court's consideration, but an essential component of reasoned discretion in applying the proper legal standard. In *Landwehr*, 2006 WI 64, ¶ 31, for example, the Wisconsin Supreme Court affirmed a placement modification decision in part because the trial court considered the relevant factors: "In modifying the placement order, the circuit court also considered the factors relevant to the Landwehr children's particular situation, such as the children's adjustment to their home and school, their existing placement order, their developmental needs, their need for stability, and the parents' relationship." In *Goberville v. Goberville,* 2005 WI App 58, ¶ 10, 280 Wis.2d 405, 694 N.W.2d 503, in contrast, the court reversed in part because it could not conclude that the trial court considered the relevant factors: "Given the facts in this case, Samuel's wishes, his developmental needs, and the willingness of each parent to support the other's relationship with Samuel would seem to be relevant factors. Yet nothing in the court's statement indicates they were considered."

Here, the court expressly disregarded the voluminous evidence presented on numerous relevant factors, basing its decision solely on Karissa's wishes. The trial court thus failed to apply the legal standard prescribed by statute and case law: analyze Karissa's best interests by considering the evidence regarding *all* relevant factors.

B. By leaving the placement modification decision in the hands of the child, the court failed to exercise discretion.

Once again, the court made token reference to its legal obligation: "I'm making the decision. I want that to be clear." R60 p.340; A-App.102. But in the very next sentence the court clarified who was actually making the decision:

> The child wants the opportunity that the divorce has deprived her of and that is a reasonable position for her to adopt at this point. And that's the opportunity to live with dad. Primarily. And the court is granting that request because I'm satisfied it's in her best interests to do so at this point."

Id. The trial court thus made a point of asserting that it was making the decision, but its statements to the contrary do not change the fact that the court left the decision in the hands of a thirteen-year-old child.

And it was not only the trial court that failed to make a decision in the best interest of the child; the guardian ad litem, too, failed to meet her responsibility to consider and advocate for Karissa's best interests, and instead focused solely on her wishes. The guardian ad litem's crucial role in placement modification proceedings is to advocate for the child's best interests, not for the child's wishes. "Advocating [for the child's best interests] may require advocating something contrary to the child's wishes. By concentrating on the child's wishes, the guardian ad litem may miss his or her obligation – to fully examine and advocate the child's best interests." *Wiederholt v. Fischer,* 169 Wis.2d 524, 536, 485 N.W.2d 442 (Ct. App. 1992).

Here, the guardian ad litem offered *no* evidence concerning Karissa's best interests or anything else. When asked by the court, "do you want to offer any evidence?" the guardian ad litem responded, "No, I have no evidence." R.58 p. 171. She offered only her placement recommendation, and that was based entirely on Karissa's wishes. "Going through the factors, . . . the only one that

really pertains to this situation are the child's desires." R.60 p.310. As with the court, the guardian ad litem referred to other factors, but expressly relied only on Karissa's wishes, based upon Zirkel's report and the "sincerity" of Karissa's wishes. *See* comments of guardian ad litem to the court, R.60 pp.310 - 319.

Both the trial court and the guardian ad litem showed their utter failure to meet their responsibilities regarding the best interests of this young child in their comments regarding the specifics of the new placement schedule. The guardian ad litem's recommendation was so reliant on Karissa's wishes that when pressed on her specific placement recommendation, she simply deferred to Karissa: "Maybe flip it. That was Karissa's recommendation; just to flip it so that mom had primary during the summer and dad had the every other weekend visit thing. . . ." R.60 pp.317-318. The trial court's comments showed a similar lack of analysis:

> [T]he guardian ad litem will create a very precise placement order and I would encourage you to take into account Exhibit 19, which is the exhibit where mom said what she was willing to give dad. It makes sense that the reverse would be true so *what she was willing to give dad is what she should – she should have* – we should have in an order consistent with, you know, some fine tuning you may have to do.

R.60 p.342; A-App.103 (emphasis added). This approach – basically, just give her whatever she wanted to give him – is not the "demonstrated rational process" required for a proper exercise of discretion. *Goberville,* 2005 WI App 58, ¶ 7.

Thus the court and the guardian ad litem abdicated their responsibility to advocate for (guardian ad litem) and decide based on (trial court) Karissa's best interests.

C. Leaving this decision in the hands of the child is especially egregious in this case because of Karissa's young age and her fervent wish not to be involved in the decision.

Common sense and our statutory structure tell us that children should not make their own placement decisions, that they do not have the necessary maturity or objectivity, that they are likely to suffer emotional damage from being put in the middle of these difficult decisions. The guardian ad litem's expert, Dr. Kip Zirkel, acknowledged this obvious fact: "Q: And is it appropriate for this 13-year-old child to make her own placement decisions? A: No." R.58 p.74.

Several facts make the court's and the guardian ad litem's decision to leave this issue in Karissa's hands particularly egregious. The first is Karissa's age. When a child is nearing adulthood, it may be reasonable for a court to recognize the child's increased independence by according the child's placement preferences greater weight. But Karissa has barely reached adolescence. She was twelve when this motion was filed, thirteen when it was decided, is years away even from a driver's license.

Secondly, the error of leaving placement decisions in the hands of children is magnified in this case because of Karissa's overwhelming desire *not* to make this decision. Indeed, the record shows that Karissa's desire to be left out of the decision-making process was perhaps her primary goal, more important to her even than which parent she ended up residing with.

Karissa's strong desire to be left out of the decision-making process was repeated by both experts, by the guardian ad litem, and by the court. Dr. John Sherfinski, who met with Karissa at the guardian ad litem's recommendation, testified, "Karissa is often asked who she wants to live with. She does not want to choose. . . . This is a young child who is doing well but is stressed by legal questions about custody." R54 p.8. Dr. Kip Zirkel found the same strong sentiment, testifying that Karissa did not want to make the decision, that Karissa felt "quite distressed" about being in the middle of this dispute, that when she was told the decision would not be up to her, "she acted as if an immense weight had been lifted off her shoulders. She heaved quite a big sigh of relief and pretty much said thank you." R.58 pp.32, 35, 36. The trial court reiterated this exchange: "when he told the child that the child didn't have to make this decision, that the court would, the child almost visibly indicated

like a weight had been lifted from her back or her head." R.60 pp.339-340; A-App.102. The guardian ad litem told the court that Karissa "told me she didn't want to make any kind of decision on her own; she wanted me to make it or the court to make it, her parents to decide." R.60 p.310.

Thus despite the crucial evidence that Karissa was "stressed" by the legal proceedings, that she emphatically did not want the decision left up to her, both the guardian ad litem and the trial court did exactly that. Both the court and the guardian ad litem left the decision where to reside in the hands of a thirteen-year-old child who had expressed an overwhelming desire *not* to decide.

D. The trial court failed to apply the statutorily mandated continuity presumption.

It is clear error for a trial court to leave placement decisions in the hands of a child. That error is compounded in post-judgment modification motions, where there is a statutory presumption that "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." Wis. Stat. § 767.451(1)(b)2.b.

This continuity presumption in modification proceedings demonstrates the "clear legislative preference for continuity in custody and placement. The legislature raised the bar for parties wishing to upset the status quo by enacting § 767.325(1)(b) because changes in custody and physical placement can be hard on children and change is not desirable unless supported by good reason." *Abbas v. Palmersheim,* 2004 WI App 126, ¶ 24, 275 Wis.2d 311, 685 N.W.2d 546. The court explained further, "the legislative decision to leave in place the presumption of continued custody and placement reveals its belief that it is *inherently harmful* to change a child's situation absent some change in circumstances that makes the status quo no longer in the child's best interest." *Id.* ¶ 34 (emphasis added).

As with its reference to the placement factors and its reference to its obligation to make the decision discussed above, the trial court made token reference to the continuity presumption. In its only reference to the continuity presumption, the court stated at the

very end of its decision, "So the rebuttable presumption is overcome." R.60 p.341; A-App.102.

But there is nothing in the court's analysis that supports its legal conclusion that the presumption is overcome, no indication at all that the court actually weighed the importance of continuity in its analysis. Even if one assumes for the sake of this argument that the court applied a proper legal standard by relying solely on the factor of the child's wishes, and even if one assumes that that factor weighed in favor of Timothy, there is no indication that the court balanced this factor against the legislatively mandated continuity presumption, which of course weighed in favor of continued primary placement with Patrina.

The evidence consistently showed, and the court specifically found, that Karissa was well adjusted to her home, school, and community, was thriving in her existing circumstances. As the court put it, "all the evidence establishes . . . that we have a consistent, responsible, successful child of above average intelligence." R.60 p.339; A-App.102. We have a more than three-year record of Karissa's success at school, home, and community while residing primarily with Patrina. Under these circumstances, where the child is thriving, one would expect the continuity presumption to carry particular weight: We should be reluctant to disrupt a placement arrangement that appears to be working well for the child.

But in fact the trial court appears to have used the fact that Karissa is thriving to *undermine* the continuity presumption.

> When parents for whatever reason get divorced, it is reasonable to expect that at somepoint [sic] if they're living primarily in one parent's household, they may want to see what it's like to live in the other parent's household. Now, there are children who may have, let's say impure motives for doing that; maybe they're living in a household, to use an example, where the parent is unduly strict or has other practices or policies as a result of which they are uncomfortable or don't feel safe. . . . But here all the evidence establishes, and in particular Dr. Zirkel's testimony and the evaluation

> by the guardian ad litem, is that we have a consistent, responsible, successful child of above average intelligence.

R.60 pp.338-39; A-App.102. In other words, because she is doing well in her mother's home, she gets to choose to live with her father. This turns the continuity presumption on its head.

The continuity presumption is meaningless if it permits modification under these circumstances. Perhaps if this was a new case, starting from scratch, Karissa's inconsistently expressed desire to live primarily with her father during the school year would be sufficient to tip the balance in his favor. But a major placement modification requires more than a showing that at times the child has expressed the desire to live primarily with her father. Even assuming both parents could provide Karissa with a supportive, loving home environment, "close cases" are "the very cases in which a presumption is most important." *Abbas,* 2004 WI App 126, ¶ 28.

E. The trial court's use of an incorrect legal standard leads to absurd results.

The trial court's application of an incorrect legal standard – essentially, that successful children decide where to reside – leads to illogical, absurd results, at least two of which are apparent in this case. The trial court called this placement dispute ridiculous, trivial, yet it used this ridiculous, trivial dispute to dramatically change Karissa's placement schedule. One would expect a "trivial" placement dispute to yield at most a trivial placement change, not a wholesale transformation.

Equally illogical is the decision to change primary placement essentially *because* the child is flourishing under the current placement schedule. One would expect a child's success under a given placement schedule to lead to a reluctance to make wholesale placement changes; instead, the court used Karissa's success to justify the placement change.

F. The evidence does not support the court's best interests determination.

In the absence of the trial court's erroneous over-reliance on Karissa's alleged wishes, the evidence does not support the court's findings that the continuity presumption was defeated and that modification was in Karissa's best interests. The trial court itself called the evidence that was unrelated to Karissa's wishes "trivial," "ridiculous," "irrelevant." Trivial, irrelevant evidence simply cannot overcome the legal presumption that continuing primary placement with Patrina is in Karissa's best interests.

Moreover, if the court had actually considered the evidence regarding factors other than the child's wishes, it would have had to conclude that modification was not in Karissa's best interest. The evidence strongly supported the trial court's finding that Karissa was thriving under the order that placed her primarily with Patrina. Among the factors that strongly supported Karissa's continued primary placement with Patrina:

767.41(5)(am)4. "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." The evidence showed without dispute that Patrina, who operates a daycare out of her home, has been available throughout Karissa's life to spend time with her, nurture her, and chauffeur her to the various events and activities that a busy child such as Karissa requires, including during the after-school hours. R.58 pp.80, 180-81, 198-99. The evidence showed without dispute that Timothy is away from home from about 7 am to about 6 pm every weekday; that he is obligated to travel overnight regularly for his employment; that when he is working or traveling he is generally unavailable to Karissa, including during the after-school hours. R.58 pp.147-48, 198; R.54 pp.19, 60, 87.

767.41(5)(am)5. "The child's adjustment to the home, school, religion and community." The evidence showed without dispute that Karissa, who has lived primarily with Patrina throughout her life, is a bright, well-adjusted, happy, social, engaged child, active in her school and community. She excels academically and thrives on extracurricular activities. R.58 pp.56, 82, 178, 192-93, 212-13.

II. EVEN IF THE TRIAL COURT COULD PROPERLY BASE ITS PLACEMENT DECISION ON THE SINGLE FACTOR OF KARISSA'S WISHES, ITS FINDING OF FACT THAT KARISSA EXPRESSED A CLEAR AND CONSISTENT DESIRE TO RESIDE PRIMARILY WITH HER FATHER IS CLEARLY ERRONEOUS.

The trial court based its placement decision on its factual finding that Karissa expressed a clear and consistent desire to reside primarily with Timothy: "the child wants the opportunity that the divorce has deprived her of and that is a reasonable position for her to adopt at this point. And that's the opportunity to live with dad." R.60 p.340; A-App.102. In the context of its discussion of Karissa's wishes, the court called her a "consistent" child. *Id.* But in fact the evidence showed that Karissa vacillated in her wishes regarding her primary placement. The trial court's finding regarding this fact that was essential to its decision is clearly erroneous.

The court heard from numerous sources regarding Karissa's wishes, and every one of them – the guardian ad litem's mental health experts, the guardian ad litem, Patrina, and Tim through his counsel – acknowledged that Karissa vacillated regarding her wishes.

The guardian ad litem, who is statutorily charged with communicating the child's wishes to the court, wrote the court on December 20, 2010, with what she called her recommendations. R.64. In that letter she stated that she had met with Karissa at least twice, and that Karissa "has vacillated regarding where she prefers to live. . . ." *Id.* In her questioning of Zirkel, she referred to Karissa "waffling," "going back and forth." R.58 pp.33, 34. In her closing statement following trial, she appeared to be confused regarding Karissa's wishes, first stating, "she has consistently expressed her desire to me that she would like to live with her dad," but then changing that representation regarding Karissa's wishes: "She did waiver [sic] in that in the fall of last year and decided that she wanted to live with her mom. Then she told me she didn't want to make any kind of decision on her own. . . ." R.60 p.310. There is no indication in the record that the guardian ad litem met with Karissa at

any time after stating in her December 20, 2010, letter that Karissa had vacillated in her wishes.

Patrina testified that at times Karissa wanted to live with her and at times she wanted to live with Timothy. R.58 p.188. Patrina also testified that after the Family Court Commissioner entered the short-lived temporary order granting Timothy primary placement, Karissa "got very quiet for a couple of days," and then told Patrina that she preferred to continue to reside with her: "Question: did you come to the conclusion that she wanted you to take steps so that she can continue in her Reedsburg school? Answer: Yes, she indicated that to me after a little while." R.58 p.189.

Timothy's counsel acknowledged Karissa's vacillation in her argument on the motion to dismiss: "Shortly before the hearing, the last – last fall, suddenly the child calls the guardian ad litem, contact the guardian ad litem and says I want to stay with mom." R.58 p.18.

Dr. Kip Zirkel was the trial court's most important source of information about Karissa's wishes. Zirkel was hired specifically to explore Karissa's wishes, and the court expressed its heavy reliance on Zirkel's testimony for this crucial fact: "the most important evidence, the evidence upon which I probably could have decided this case, is Dr. Zirkel's testimony." R.60 p.337; A-App.101. Zirkel stated in both his written report and his testimony that Karissa's wishes fluctuated. In his April 8, 2011, Motive Evaluation Summary, Zirkel reports that Karissa "has found herself waffling." R.44 p.6. Zirkel testified about Karissa "wavering back and forth." R.58 p.32.

Zirkel ultimately concluded that Karissa wished to reside primarily with Timothy. He reached this conclusion after spending a total of about ninety minutes with Karissa over the course of two days. R.58 p.59. And Zirkel himself acknowledged that Karissa's wishes might have continued to waver after his two sessions with her:

> Q. Can you assume, or are you assuming that her position is similar to what it was at the time you interviewed her in March?

> A. That would be a mere assumption, which I could not make. . . . As I say, all I have to go on is what I have down there on the last date of the report.

R.58 p.39.

Moreover, as Zirkel himself acknowledged, both parents tried to influence Karissa's wishes regarding her placement. R.58 pp. 32, 48. Timothy testified that when Karissa wrote the court asking to change placement, that letter was initiated by Timothy asking Karissa if she wanted to write the judge and say she wanted to live with him. R.58 pp.104-05, 136. When Timothy was asked in court whether he tried to influence Karissa regarding the move, he replied, among other things, "To be completely honest, I would have to say yeah, in some ways, I may have influenced her." R.58 pp.105-06.

Perhaps in a simpler case where a child has consistently expressed a desire to change placement, Zirkel's quick motive evaluation might help the court identify children who have "impure motives," as the court put it, for their expressed preference. R.60 p.338; A-App. p.102. This case, however, involving among other things vacillation by the child and pressure from both parents, is too complex for Zirkel's ninety-minute, 21-question "motive evaluation" to be effective and reliable.

When the trial court relies heavily on one factor in its best interest analysis without a sufficient basis for its findings of fact regarding that factor, the trial court erroneously exercises its discretion. In *Helling v. Lambert,* 2004 WI App 93, 272 Wis.2d 796, 681 N.W.2d 552, for example, the trial court relied heavily on its finding that Lambert's living situation was unstable. The Court of Appeals determined that the court lacked a sufficient factual basis for this finding, and reversed because of the trial court's heavy reliance on this factor. While the trial court also had considered other factors,

> The trial court itself noted that many of the other factors it considered 'really don't cut either way.' Lambert's living situation was one of the few main factors the court focused on in making its decision. It is

> impossible to know what conclusion the trial court would have reached had it not relied heavily on Lambert's living situation to reach that conclusion. Because the trial court lacked a sufficient factual basis for a finding upon which it relied heavily in making its placement decision, we conclude that it erroneously exercised its discretion.

Lambert, 2004 WI App 93, ¶ 19.

The same must be said here: because the trial court lacked a sufficient factual basis for a finding (that Karissa consistently wished to live with Timothy) upon which it relied heavily (or exclusively) in making its placement decision, we must conclude that it erroneously exercised its discretion.

III. THE TRIAL COURT MODIFIED PLACEMENT FOR AT LEAST TWO YEARS ON THE BASIS OF A RECOMMENDATION FOR A TEMPORARY, TRIAL-PERIOD PLACEMENT MODIFICATION.

Both Dr. Kip Zirkel and the guardian ad litem premised their opinions concerning Karissa's placement on their understanding that placement would be modified for a trial period of perhaps a year, after which it would be reevaluated and, if advisable, modified again. Asked about the timing of a period for trying placement with Timothy, Zirkel stated, "we usually put a year in for an evaluation point to see how things are going. We've had cases, though, where a child has moved in with another parent, within a month they decide it was a huge mistake and so now we're back to square one." R.58 p.38. Zirkel reiterated later in his testimony that any modification should be considered temporary:

> Q: Is that why, Dr. Zirkel, you believe that any change should more or less be on a temporary basis?
>
> A: Yes, because we have many times where a child or a parent, for that matter, realizes the change wasn't as good as anticipated, there were unknown factors that

> came up which made matters worse. And that's why we need to leave the door open.

R.58 p.61. In her recommendation to the court following trial, the guardian ad litem echoed this position: "that would be my suggestion; that is one of Kip Zirkel's suggestions, too, you know, see how it goes after a year." R.60 p.318.

The trial court, however, stated that in its view, the two-year truce period of Wis. Stat. §767.451(1)(a) would prohibit modification for two years (absent extreme circumstances): "it's going to take two years before anybody can come back here and say well, send her back to mom." R.60 p.340; A-App.102.

It is Patrina's position on appeal that the trial court is incorrect on this legal issue, that Wis. Stat. § 767.451(1)(a) prohibits modification for two years (absent extreme circumstances) only after the final judgment in a case, and not after subsequent orders. Pursuant to this analysis, the order that is the subject of this appeal is modifiable upon a substantial change of circumstances/best interests analysis pursuant to Wis. Stat. §767.451(1)(b).[1]

But regardless of whether the trial court is correct that the two-year truce period begins anew following modification, it is clear that there is no provision for a "try-it-out" placement modification period. Placement modification requires at minimum a substantial change of circumstances, a finding of best interests, and a defeat of the continuity presumption. These three absolute prerequisites to modification were required before the court could grant Timothy's modification motion, and they will be required before a court can modify placement in the future.

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[1] Patrina's counsel is aware of no caselaw deciding whether the two-year "truce period" applies only to the final judgment, or also to subsequent orders. The statutory language appears to support Patrina's position, not the trial court's position: ". . . a court may not modify any of the following orders before 2 years after *the* final judgment. . . ." Wis. Stat. §767.451(1)(a)(emphasis added). Clarification regarding this issue would be helpful to trial courts, litigants, and the family law bar.

Thus the underlying basis for the recommendations – that this is a temporary placement modification, subject to change if it is not working well – was incorrect. Zirkel's statement that any change should be temporary, the guardian ad litem's recommendation that the placement change be reevaluated after a year, show that both rendered their opinions on the basis of an assumption regarding the law that the trial court did not share. We have no way of knowing whether they would have recommended as they did had they known that Karissa would be locked into the new placement arrangement for at least two years.

IV. BIAS AGAINST PATRINA'S RELIGION AND SEXUAL ORIENTATION AFFECTED THE TRIAL COURT'S PLACEMENT DECISION.

Timothy took every opportunity throughout these proceedings to label Patrina a lesbian and a Wiccan, both expressly and implicitly. Timothy testified about Patrina's "dubious moral climate," about his concerns stemming from Patrina's "alleged sexual and religious preference." R.54 p.25; R.58 p.135. Timothy's trial brief contains numerous, repeated, pejorative references to "pagan rituals," "lesbian lifestyle," "professed Wiccan," etc. R.42. Timothy's attorney argued, "dad's world doesn't have this moral quandary of do I have a lesbian relationship, do I not have a lesbian relationship." R.60 p.324.

A court may consider a parent's lifestyle choices if the court determines that those lifestyle choices affect the particular child, and not based upon the court's general opinion of the lifestyle. "Because freedom of association is constitutionally protected, a court may not base a placement decision on a parent's nonmarital sexual conduct or relationship with a third party absent specific evidence that the conduct or relationship in question has had or would have a significant adverse impact on the child." *Helling,* 2004 WI App 93, ¶8.

Here, the trial court expressly disavowed any reliance on the evidence concerning what it called "mom's world." R.60 p.341; A-App.102. But the bias against Patrina's religion and sexual orientation nonetheless infected the proceedings and the decision.

The trial court's comment that it disregarded this evidence would seem to remove from the decision potential bias based on religion and sexual orientation. But of course it is not that simple. As discussed above, the court relied almost exclusively on the child's wishes, as relayed by Zirkel and the guardian ad litem. Even if the trial court were truly able to disregard the constant references to Patrina's religious and romantic preferences, the evidence on which it did base its decision – Zirkel's and the guardian ad litem's representations regarding Karissa's wishes – was affected by these biases.

In Zirkel's list of "factors which contribute to Karissa's desire to move in with her father," Number One is, "Karissa sees herself as a traditional, conservative, Christian girl, and has difficulty with her mother's choice of a female partner in the household." R.44 p.4. When questioned about this statement, Zirkel acknowledged that it likely did not come from Karissa:

> Q: When you list your factors at the bottom of page four and you say Karissa sees herself as a traditional conservative Christian girl, do you remember where those words came from?
>
> A: No. I basically take that out – her father expressed to me when I first met with him that she has a traditional Christian background. And – but she expressed to me during our interviews about her being a traditional kid and having some trouble with her mother's religious perspectives.

R.58 pp.63-64. Patrina testified that she believed this description originated with the guardian ad litem: "Q When you read the word that Karissa views herself as a traditional or traditional conservative Christian girl, what did you think? A: I thought that was the guardian ad litem's words." R.58 pp.202-03.

That the guardian ad litem was influenced by Patrina's "lifestyle" is also evident from the language she used in her oral recommendation. She referred to "two completely different homes; home styles, home lives." R.60 p.310. She told the court, "what it

boils down to here is very, you know, different divergent family situations." R.60 p.315. And she expressly stated her reliance on Zirkel: "I can find recommendations based on – relying on Dr. Zirkel's opinion and recommendations and report." R.60 p.314.

Thus this belief that Karissa is a "traditional, conservative, Christian girl" was initially verbalized by Timothy and/or the guardian ad litem, was repeated to Zirkel, and from there made its way to the court as an important part of Karissa's rationale for her wishes. Despite its protestations to the contrary, it seems possible, even likely, that the court was influenced by the inappropriate, irrelevant, inflammatory evidence regarding Patrina's sexual and religious preferences as it made its decision.

V. THE TRIAL COURT'S FACT FINDING UNDERLYING ITS DETERMINATION OF A SUBSTANTIAL CHANGE OF CIRCUMSTANCES WAS CLEARLY ERRONEOUS.

"Whether there has been a substantial change of circumstances is a mixed question of law and fact. The circuit court's fact finding regarding circumstances 'before,' at the time of the last order substantially affecting placement, and 'after,' at the time of the new motion, and whether when compared these facts constitute a change will not be disturbed unless they are clearly erroneous. However, whether the change is substantial is a question of law we review de novo. A substantial change of circumstances is one such that it would be unjust or inequitable to strictly hold either party to the original judgment." *Lofthus v. Lofthus,* 2004 WI App 65, ¶17, 270 Wis.2d 515, 678 N.W.2d 393 (citations omitted).

The trial court found a substantial change of circumstances based upon Patrina's move:

> The initial issue the court has to decide is whether there's been a substantial change in circumstances. I'm well satisfied that in this case, and as identified in my questions with counsel, that I think it comes down to basically a totality of the circumstances test and exercise of judicial discretion, which is guided by legal standard, but nevertheless is based upon the evidence.

> And I'm satisfied in this case that that standard is clearly met and I base that upon the fact that there was a move that substantially changed the relationship that both parents were able to have with the child.

R.60 p.337; A-App.101.

But the single finding of fact the court pointed to as constituting a substantial change in circumstances – that Patrina's move changed the relationship both parents were able to have with Karissa – is not supported by the evidence.

Timothy testified that at the time of the divorce he knew that Patrina was considering moving, that Patrina told him she might move out of Ontario for better employment and school opportunities. R.54 pp.83, 84. Patrina testified that the provisions contained in the parties' Marital Settlement Agreement reflected their acknowledgment that Patrina planned to move a substantial distance. R.58 pp.174, 199.

Thus Patrina's move itself, contemplated by the parties at the time of the previous placement order, cannot constitute a substantial change of circumstances. The court found that this move "substantially changed the relationship that both parents were able to have with the child." R.60 p.337; A-App.101. But the record shows that the move changed the parties' relationship with Karissa remarkably little. One might logically assume that the increased distance between the parties resulted in a decrease in the amount of time Timothy had with Karissa, but the record shows the opposite: Timothy's placement increased from 26% at entry of the previous order to 32% at the time of the hearing. R.54 pp.71-72. Timothy did not exercise his mid-week placement before the move, and he did not exercise his mid-week placement after the move. Tr.54 pp.79-80.

A move of fifty miles which was provided for in the original order, and which resulted in Timothy having more placement time than he had before the move, does not constitute a substantial change in circumstances.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the trial court and dismiss or deny Joint-Petitioner-Respondent's Motion to Modify Placement.

Dated: March 5, 2012

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 8040 words.

The contents of the paper brief and the electronic brief are identical.

Dated: March 5, 2012

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