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

**July 22, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2007AP885** **Cir. Ct. No. 2003FA251**

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

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**IN RE THE MARRIAGE OF:**

**MICHELE M. WARNER, N/K/A MICHELE M. SCHROEDER,**

**PETITIONER-APPELLANT,**

**V.**

**CHARLES J. WARNER,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Polk County: MOLLY GALEWYRICK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michelle Warner, n/k/a Michelle Schroeder, appeals an order modifying primary placement of the minor children to Charles Warner. Michelle contends the circuit court erred by applying WIS. STAT.

§ 767.327 to resolve the placement dispute rather than WIS. STAT. § 767.325(1).[1] Michelle also argues the court erroneously exercised its discretion by concluding that removing the children from Clear Lake to Wisconsin Rapids was unreasonable and not in the best interests of the children. We affirm.

¶2 The parties were divorced after a contested hearing on August 23 and September 2, 2004.[2] Joint custody and primary placement was awarded to Michelle. During the spring of 2005, Michelle was advised that her teaching position at Clear Lake would be eliminated. She was offered a position at 65% of her income. Michelle then took a position with the Wisconsin Rapids Public School District and removed the children.

¶3 Michelle moved for revision of judgment under the statute relating to revision of physical placement orders, WIS. STAT. § 767.325(1), rather than the statute pertaining to moving a child's residence, WIS. STAT. § 767.327. A hearing was held, at which time the circuit court advised, "As counsel knows, the section of the statute that governs moving the children's residence is 767.327." The court

[1] References to Wisconsin Statutes are to the 2003-04 version unless otherwise noted. 2005 Wis. Act 443 amended WIS. STAT. § 767.327 and renumbered the provision as WIS. STAT. § 767.481, effective January 1, 2007. The same act amended WIS. STAT. § 767.325 and renumbered it as WIS. STAT. § 767.451, effective January 1, 2007. The date of the final order in the present case is January 17, 2007. The parties agree there are no material amendments in these governing provisions and, therefore, we need not determine whether the statutes apply prospectively or retrospectively. Because the parties each cite to the predecessor statutes, for the sake of simplicity we also cite to the predecessor statutes.

[2] We note that WIS. STAT. RULE 809.19(1)(d) requires a statement of the case with appropriate references to the record. Michelle's statement of the case entirely fails to cite to the record on appeal. Michelle cites to the record in the argument section of her brief, but those citations are not in conformity with the rules. Michelle merely cites to a transcript date and page. It should be apparent to all lawyers that appellate briefs must give reference to the record cite, not merely the date of a particular transcript, as well as the page and line for each statement made in the appellate brief.

directed the parties to file appropriate motions under that statute and also indicated the guardian ad litem would be asked to make a recommendation to the court. The court subsequently heard testimony and considered the recommendation of the GAL and the reports of experts. The court concluded the children had a life-long connection to the Clear Lake community, including home, school and church which provided them continuity and security. The court found modification of the placement was not in the children's best interest and the removal to Wisconsin Rapids was unreasonable. The court found Michelle's move was primarily for economic reasons or was "an underhanded way to move closer to a significant other." The court ordered that Michelle receive three weekends out of four every month during the school year and that summers be equally split. Michelle now appeals.

¶4 The modification of a physical placement schedule lies within the sound discretion of the circuit court. ***Weiderholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992). We will affirm a determination on placement modification as long as it represents a rational decision based on the application of the correct legal standards to the facts of record.

¶5 Michelle argues the removal statute, WIS. STAT. § 767.327, "is only appropriate procedurally if, indeed, Wisconsin Rapids is further than 150 miles from Clear Lake, i.e., if radial miles cannot be used as a geographic measure under Sec. 767.327, Stats." Michelle contends she reasonably believed the distance between Wisconsin Rapids and Clear Lake to be less than 150 miles as measured by radial miles. Michelle therefore insists the requirement of notice under WIS. STAT. § 767.327(1)(a)2, when one parent intends to "[e]stablish his or her residence at a distance of 150 miles or more from the other parent," was not

triggered. Michelle also argues she had ample economic justification for the move to Wisconsin Rapids.

¶6 Michelle's arguments regarding her economic needs are without merit. In her reply brief, Michelle does not refute the issue that economic conditions are insufficient to justify an order modifying physical placement, regardless which statute is applied. *See* WIS. STAT. § 767.327(3)2b and § 767.325(1)(b)3. The issue is therefore deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Moreover, Michelle's argument that Wisconsin Rapids is less than 150 miles is contradicted by her own sworn testimony that the distance was, "About 155, 156 miles driveable, 130 radius."

¶7 The court ruled that Michelle's argument regarding radius distance was "somewhat superficial" because the distance was "as the crow flies." The court stated,

> Since she and the children can't fly, they have to travel as mere mortals over the highway system, and in that regard, Wisconsin Rapids is much more than 150 miles from Clear Lake.

¶8 The circuit court correctly reasoned the relocation statute is based on driving miles, not radial miles:

> We have to get in our vehicles and drive there; we can't just draw a radius from Clear Lake if there isn't a road that will actually take you to Wisconsin Rapids….

¶9 As a practical matter, we agree with the circuit court that the distance the other parent must travel should generally depend on ordinary routes of travel. Otherwise, the realistic separation distance could far exceed 150 miles depending upon terrain, the existence of roads and bridges, and the meandering of

roadways, even though the distance may be less "as the crow flies." We therefore reject Michelle's argument that WIS. STAT. § 767.327 does not apply because the distance must be measured in radial miles.[3]

¶10 Michelle next argues the circuit court erroneously exercised its discretion by finding the removal unreasonable and not in the best interests of the children.[4] We disagree. More than ample evidence supports the court's decision.[5] Here, the court relied upon the recommendations of the guardian ad litem and clinical neuropsychologist Dr. Paul Caillier, both of whom concluded relocation was not in the best interests of the children.

¶11 In making their recommendations, the GAL and Caillier noted the following: (1) the original situation with Michelle residing in Clear Lake was ideal; (2) the move to Wisconsin Rapids was a unilateral decision on Michelle's part; (3) Michelle failed to consult with mental health professionals "regarding the effect of the removal or anything else on the unilateral move, it just happened"; (4) the move was harmful to the children's sense of continuity, because it would remove them from the only school, church and community relationships they had

[3] Michelle also concedes she moved the children during the two-year "truce period" under WIS. STAT. § 767.325(1)(a). Under this statute, a change in physical placement is prohibited unless the movant can establish the current placement conditions are physically or emotionally harmful to the best interests of the children. *See* ***id.*** Michelle did not attempt to meet this burden.

[4] Michelle states in her brief that "the trial court abused its discretion even if Sec. 767.327, Stats., is the appropriate standard." Appellate courts have not used the term "abuse of discretion" since 1992 because of its unjustified negative connotations. *See* ***Hefty v. Hefty***, 172 Wis. 2d 124, 128 n.1, 493 N.W.2d 33 (1992).

[5] In ***Hughes v. Hughes***, 223 Wis. 2d 111, 588 N.W.2d 346 (Ct. App. 1998), we explained the interplay between WIS. STAT. § 767.325, concerning revisions to physical placement in the absence of a move, and WIS. STAT. § 767.327, which adds a broader list of considerations for a revision in a removal situation.

ever known; (5) the schedule recommended by Caillier would foster access and a relationship with both parents; (6) the damage to the children based on Michelle's move was inevitable but would be lessened if placed with Charles; (7) Michelle's conduct was consistent with her "moving on;" and (8) there was no evidence that Michelle looked for a summer job closer to Clear Lake to supplement her reduction in pay if she remained teaching at Clear Lake.

¶12 The GAL also advised the court that he was troubled by Michelle's desire during the divorce proceeding to move to Milwaukee to be with a boyfriend. The GAL stated, "Now here we are a couple of years later and now there's evidence that she was dating before she moved from Clear Lake. She certainly has no control over Federal cuts to her job. But lo and behold [she] ends up landing a job right where the boyfriend lives."

¶13 The court gave lengthy explanations supporting its decision. The court concluded:

> Therefore, after considering these criteria, the pertinent factors under 767.24 paren 5, the recommendations of the guardian ad litem and the reports of experts, and considering the totality of circumstances, not the least of which recognizes that these girls have a life-long connection to the Clear Lake community, including home, school and religion, which provides them continuity and security and stability, I find that modification of physical placement granting primary placement to dad, Mr. Warner, is in the girls' best interest. That removal to Wisconsin Rapids will result in substantial change in circumstances and that the rebuttable presumption that continuing [primary] physical placement with mom is in their best interests is overcome by a showing that the move was unreasonable, and not in the children's best interest, for all the reasons cited. It appears to me to have been primarily for economic circumstances, which does not meet the language of the statute.

¶14 None of the court's factual findings was clearly erroneous. After consideration of all the evidence, the court reasoned Michelle's move was unreasonable and the children's best interests were served by being primarily placed with Charles. This was a reasonable exercise of discretion.

*By the Court.*—Order affirmed.

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