COURT OF APPEALS
DECISION
DATED AND RELEASED

September 28, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-3268

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

IN RE THE PATERNITY OF STEPHENIE R.N.:

ANDREW J.N., JR.,

Petitioner-Respondent,

v.

WENDY L.D.,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed and cause remanded with directions*.

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

VERGERONT, J. This appeal is a continuation of a dispute between Andrew J. N. and Wendy L. D. over the legal custody and physical

placement[1] of their daughter, Stephenie R. N., born July 4, 1987. The factual and legal history of this dispute is set forth in ***In re Paternity of Stephanie R. N.***, 174 Wis.2d 745, 498 N.W.2d 235 (1993), *aff'g* ***In re Paternity of S.R.N.***, 167 Wis.2d 315, 481 N.W.2d 672 (Ct. App. 1992). In ***Stephanie R. N.***, the supreme court reversed an order of the Rock County Circuit Court that modified the initial custody and placement order under which Wendy had sole custody and primary placement of Stephenie. ***Id.*** at 774, 498 N.W.2d at 245.

Wendy now appeals a subsequent judgment entered by the Dane County Circuit Court on a subsequent motion filed by Andrew. This judgment modifies the initial order by granting sole custody and primary placement to Andrew. She appeals on three grounds: (1) the trial court was without authority to enter an ex parte temporary order granting Andrew sole custody and primary placement because it was inconsistent with the supreme court's mandate in ***Stephanie R. N.***; (2) the trial court was without authority to grant sole custody and primary placement to Andrew because of the supreme court mandate; and (3) the best interest standard of § 767.325(1)(b), STATS., is not applicable and Andrew did not present substantial evidence that it would be emotionally or physically harmful to Stephenie's best interest for sole custody and primary placement to be with Wendy, as required by § 767.325(1)(a).[2]

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[1] The terms "legal custody" and "sole legal custody" are defined in § 767.001(2) and (6), STATS. The term "custody" as used in this opinion refers to "legal custody." The term "physical placement" is defined in § 767.001(5). The term "placement" as used in this opinion refers to "physical placement."

[2] Section 767.325(1), STATS., provides:

> (1) SUBSTANTIAL MODIFICATIONS. (a) *Within 2 years after initial order.* Except as provided under sub. (2), a court may not modify any of the following orders before 2 years after the initial order is entered under s. 767.24, unless a party seeking the modification, upon petition, motion, or order to show cause shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child:
>
> 1. An order of legal custody.

We conclude that because remittitur from the supreme court had not yet occurred, the trial court did not have jurisdiction to enter the ex parte temporary order; and even after remittitur, the court had no authority to enter such an order because it was inconsistent with the supreme court mandate. However, we also conclude that because Wendy did not seek enforcement of the supreme court mandate, but instead entered into a stipulation permitting Andrew to retain sole custody and primary placement pending the trial court's decision on his motion, she is not entitled to enforcement of the supreme court mandate. Finally, we conclude that under the circumstances of this case, the proper standard to apply in deciding Andrew's motion is whether it is in Stephenie's best interest for sole custody and primary placement to be with Andrew, with certain modifications to the standard set forth in § 767.325(1)(b), STATS., which we explain below. Because the trial court's decision to grant

(..continued)

2. An order of physical placement if the modification would substantially alter the time a parent may spend with his or her child.

(b) *After 2-year period.* 1. Except as provided under par. (a) and sub. (2), upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:

a. The modification is in the best interest of the child.

b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

2. With respect to subd. 1., there is a rebuttable presumption that:

a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.

b. 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.

3. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under subd. 1.

custody and placement to Andrew is a reasonable one when this legal standard is applied to the facts of record, we affirm.

BACKGROUND

In ***Stephanie R. N.***, the supreme court affirmed this court's decision that the Rock County trial court erred when it ordered sole custody and primary placement transferred from Wendy to Andrew. Andrew had not presented substantial evidence, the supreme court ruled, that removal from Wendy's care was necessary because the custodial conditions with Wendy were harmful to the physical or emotional best interest of the child, as required by § 767.325(1)(a), STATS., when modification is sought within two years of the initial order.[3] ***Stephanie R. N.***, 174 Wis.2d at 770-71, 498 N.W.2d at 243. The supreme court reversed the trial court order and directed that sole custody and primary placement be returned to Wendy in accord with the initial order entered on December 6, 1988. ***Id.*** at 774, 498 N.W.2d at 245.

The supreme court issued its decision on April 20, 1993. On May 21, 1993, Andrew filed a motion in Dane County Circuit Court,[4] requesting modification of the December 6, 1988 order by granting him sole custody and primary placement. On the same day, at Andrew's request, the trial court issued an ex parte order that Wendy show cause why a temporary order should not be entered awarding sole custody and primary placement of Stephenie to Andrew based on a substantial change of circumstances and the best interest of Stephenie. The court set a July 27, 1993 hearing date on the motion and ordered that, pending the hearing, Andrew was to exercise the sole custody and primary

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[3] The initial order granting Wendy sole custody and primary placement was entered on December 6, 1988, incorporating the terms of an oral decision rendered on August 9, 1988. A motion to temporarily transfer primary placement to Andrew because of Wendy's failure to comply with the visitation order was filed on February 9, 1989, and granted on February 17, 1989. After a final hearing, the court on April 20, 1990, granted Andrew sole custody and primary placement, allowing Wendy periods of physical placement only if supervised by the Department of Social Services. *See* ***In re Paternity of Stephanie R. N.***, 174 Wis.2d 745, 756-58, 498 N.W.2d 235, 237-38 (1993).

[4] Andrew, Stephenie and Wendy had all moved to Dane County.

placement rights that he had been exercising and Wendy was to retain the limited supervised placement rights she had been exercising.[5]

Based on a stipulation between the parties, which will be discussed in more detail later in the opinion, Andrew retained sole custody and primary placement rights pending the trial on his motion, which was held in August 1994. After the trial, the trial court granted sole custody and primary placement to Andrew, with substantial periods of physical placement to Wendy as outlined in the family court counselor's report.[6] The court determined that the appropriate standard was whether the modification was in the best interest of the child under § 767.325(1)(b), STATS., because more than two years had passed since the initial order was issued on December 6, 1988. But it also held that the evidence supported a modification of the initial order under the more stringent standard of § 767.325(1)(a).

SUPREME COURT MANDATE

We agree with Wendy that the trial court was without jurisdiction and authority to enter the ex parte temporary order because it was inconsistent with the supreme court mandate. However, because she did not seek to compel compliance with the supreme court mandate, but instead entered a stipulation confirming the temporary order, that issue is now moot.[7] For the same reasons--her failure to seek enforcement of the supreme court mandate and her entering

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[5] The ex parte order also referred the matter to the Dane County Family Court Counseling Service for an expedited evaluation and recommendation regarding temporary custody and placement by July 27, 1993, and for a final custody and placement evaluation and recommendation. The Family Court Counseling Service was also ordered to seek the appointment of a guardian ad litem.

[6] Under the trial court's order, Wendy has physical placement every other week from Thursday after school until Monday morning during the school year; every other week from Thursday morning to Tuesday morning during the summer; two weeks vacation; rotating holidays and spring vacation on an equal basis with Andrew; and one-half of winter vacation.

[7] Although the issue of the ex parte temporary order is moot, we address it because it is a necessary part of our discussion of the other issues Wendy raises.

the stipulation--we conclude that Wendy is not entitled to enforcement of the supreme court mandate.

Ex Parte Temporary Order

The supreme court's mandate directed that sole custody and primary placement be returned to Wendy in accord with the initial December 6, 1988 order. Andrew filed a motion for reconsideration in the supreme court on or about May 7, 1993. That motion was denied on June 8, 1993. Remittitur to the Dane County Circuit Court was ordered on June 8, 1993. Meanwhile, Andrew had filed his motion in Dane County Circuit Court for modification of the December 6, 1988 order and the trial court had entered the ex parte temporary order.

A trial court has no jurisdiction to act on a matter that is on appeal until receiving remittitur of the record from the reviewing court. ***State v. Neutz***, 73 Wis.2d 520, 522, 243 N.W.2d 506, 507 (1976).[8] Once the reviewing court, in this case the supreme court, has issued its mandate, it is the duty of the trial court to enter judgment in accordance with the mandate. ***State ex rel. Reynolds v. Breidenbach***, 205 Wis. 483, 485, 237 N.W. 81, 82 (1931).

Since remittitur did not occur until June 8, 1993, the trial court was without jurisdiction to enter the ex parte temporary order before that date. After that date, it had a duty to act only in accordance with the supreme court mandate. Andrew was not foreclosed by the supreme court's mandate from moving to modify the December 6, 1988 order on grounds that arose after the erroneous modification of that order. But the ex parte temporary order he

[8] A trial court may take certain actions whether or not an appeal is pending and these include revisions of orders for legal custody and physical placement. *See* § 808.075(4)(d)1, STATS. However, we do not interpret this statute to permit a trial court to revise a custody or physical placement order when the pending appeal concerns a revision to that same order.

obtained pending a resolution of his motion was, in effect, a stay of the supreme court mandate.[9]

The trial court explained that it felt compelled to issue the ex parte order because, since Stephenie had then been in her father's home for five years, the court wanted to determine what was best for her, "rather than to allow somebody just to come and make an arbitrary change." We do not suggest that the trial court lacked authority, after remittitur, to enter an order concerning the timing and manner of the transition of custody and primary placement from Andrew to Wendy. But such an order must be consistent with the supreme court mandate that custody and primary placement be returned to Wendy in accordance with the December 6, 1988 order. The ex parte temporary order was plainly inconsistent with the mandate. It did not implement the mandate on a reasonable basis. It implicitly contemplated that custody and primary placement might never be returned to Wendy, depending on the disposition of Andrew's motion. We conclude the trial court did not have the authority to enter such an order.

Wendy's recourse to compel the trial court to comply with the supreme court mandate was to file a petition with the appellate court for a writ of mandamus. ***M. & M. Realty Co. v. Industrial Comm'n***, 267 Wis. 52, 61, 64 N.W.2d 413, 417 (1954). However, she did not pursue this remedy. Instead, she entered a stipulation essentially confirming the temporary order.

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[9] Andrew apparently relied on the dissent in ***Stephanie R. N.***, which states:

> The reality of this case is that after the majority opinion is issued the child will be returned to the custody of her mother. The father then may file a new motion with the court seeking custody of the child under the "best interests" standard of sec. 767.325(1)(b), because the initial custody order is now more than two years old.

In re Paternity of Stephanie R. N., 174 Wis.2d 745, 778, 498 N.W.2d 235, 247 (1993) (Wilcox, J., dissenting). However, even if the dissent correctly states the standard to be applied to Andrew's new motion, the dissent does not suggest that Andrew need not comply with the mandate pending resolution of his motion. To the contrary, the dissent expressly states that "the child will be returned to the custody of her mother." ***Id.*** at 778, 498 N.W.2d at 247 (Wilcox, J., dissenting).

Stipulation

Wendy appears to argue that she intended to stipulate that Stephenie continue to live with Andrew only on the condition that, at some time to be determined, she have primary placement and sole custody. However, the trial court made this finding with respect to the stipulation:

> At the July 27, 1993, hearing, both parties were present, and the petitioner, by Attorney John D. Hanson, Respondent, by Attorney Timothy Henney, the guardian ad litem, Jack Koshalek, and the Family Court Counseling Service for Dane County, by Arleen Wolek, entered into a stipulation not to make the custody change at that time in the best interests of the child, and to allow a stepping process for increased placement with the mother pending a final hearing before this court as to whether the legal custody and primary placement should be changed. *While the respondent claims now that she did not agree, there is no doubt in my mind that she did agree on July 27, 1993.* (Emphasis added.)

We may not set aside the trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. The following are the pertinent facts relating to the stipulation.

On June 22, 1993, Wendy's counsel requested by letter that the Rock County court enter an order restoring the December 6, 1988 order. After Andrew's counsel objected on the ground that a motion was pending in Dane County Circuit Court and that there should be a conference involving the judges and all parties to determine which court should exercise jurisdiction, neither Wendy nor her counsel took further action in the Rock County court.

Wendy's counsel moved to dismiss Andrew's pending motion and to "restor[e] the trial court's original order of December 6, 1988." However, this motion was not pursued. Instead, at the hearing on July 27, 1993, the parties entered a stipulation that was read into the record by the guardian ad litem.

Andrew, Wendy, their counsel, Arleen Wolek, the family court counselor, and the guardian ad litem were present in court. The guardian ad litem stated they had agreed "how to handle the matter in the interim while the [custody] study [ordered on May 24, 1993] continues."

According to the guardian ad litem, the agreement was that the ex parte order the court had previously signed would continue in effect, with Wendy having certain expanded physical placement rights and the family court counseling service and the guardian ad litem having the ability to alter that schedule; and the therapist who had been providing services to the family, Dr. Lorraine Broll, was to be replaced by Dr. Erica Serlin. Details concerning school and medical records, transportation and overnight placement with Wendy were also covered in the guardian ad litem's oral statement. The court asked Wendy's counsel if that was his understanding of the agreement and her counsel stated: "That is my understanding of the stipulation, Your Honor, and I had previously talked to Ms. Wolek about Dr. Serlin, and those are agreeable to us."

The guardian ad litem was to draft the order based on the stipulation. However, that stipulation was never reduced to writing. A written "Amended Temporary Order Pending Modification of Final Order of Paternity" was entered on January 5, 1994. This order, based on recommendations of Ms. Wolek and the guardian ad litem, provided for more physical placement with Wendy than did the July 27, 1993 stipulation, and also addressed the fees of the guardian ad litem and of the court-appointed psychologist, Dr. Beverly Bliss. The written amended temporary order concluded by stating that, "All other provisions of the Temporary Order entered on July 27, 1993 that are not inconsistent with this Order shall remain in full force and effect."

At the trial on Andrew's motion, which began on August 8, 1994, Wendy represented herself.[10] She testified that she wanted the supreme court mandate enforced. She also testified, in response to questions from Andrew's counsel, that she understood that the issue that the trial court was to decide was not necessarily the enforcement of the supreme court mandate, and that she was aware that the evidence taken at the trial would determine whether a

[10] After Stafford, Rosenbaum, Rieser & Hansen was permitted to withdraw as counsel for Wendy on July 8, 1994, Wendy represented herself.

modification of the original order should take place. She did not recall her attorney telling her that the agreement at the July 27, 1993 hearing was for the child to continue to reside with Andrew. She said she thought the purpose of the hearing on that date was for the court to decide whether Stephenie would continue to reside with Andrew. She testified that she did not see a written order until October. She acknowledged that she did not, nor did an attorney on her behalf, ask for relief from the stipulation, although she was represented "[t]hroughout." She testified that she asked an attorney to "appeal" the October order but no appeal was filed.

Arleen Wolek testified that she discussed the stipulation with Wendy when she met with her in July 1993, before the July 27, 1993 hearing date. Wendy told Ms. Wolek that she knew she could enforce the supreme court mandate but she did not feel that was in Stephenie's best interest. She felt it necessary for Stephenie to remain with her father but would start working for more time with her. At the time of their conversation, Ms. Wolek thought that Wendy meant that Stephenie should remain primarily with Andrew, but have more time with her. However, because of a letter Wendy wrote her in February, Ms. Wolek testified it became clear to her that, either in July Wendy had wanted to phase in more time with Stephenie with a goal of having primary placement, or after July Wendy had started to think that this is what she wanted to do.

In view of Wendy's presence in court when the stipulation was read, the testimony at trial, the absence of any reference in the oral stipulation or the written amended temporary order to Wendy's having custody and primary placement, and the absence of any action to have the supreme court mandate enforced, or the stipulation or amended temporary order set aside, we conclude the trial court's finding on the stipulation is not clearly erroneous.

However, the trial court's finding on the stipulation does not completely address Wendy's argument with respect to the supreme court mandate. Her position, as we understand it, is that although she did not attempt to enforce the supreme court mandate, and even if she did agree to let Stephenie continue to reside with Andrew until the trial court decided his motion, the trial court must, because of the supreme court mandate, ultimately award her sole custody and primary placement. This is a mistaken view of the significance of the supreme court mandate.

The supreme court mandate, as we stated above, did not foreclose Andrew from moving to modify the December 6, 1988 order, although he could not, of course, litigate issues that had been or could have been litigated in the prior proceeding. Wendy's stipulation that Andrew have sole custody and primary placement until the trial court decided his motion is inconsistent with her insisting that primary placement and sole custody be returned to her based on the supreme court mandate. Having chosen the latter course, she was foreclosed from insisting at the trial on Andrew's motion that the supreme court mandate be enforced.

Wendy's decision not to enforce the supreme court mandate was motivated by a desire to protect Stephenie from an abrupt change. That is not disputed. We commend Wendy's concern for the welfare of her daughter. But we must conclude that the manner in which she chose to protect her daughter from an abrupt change did not preserve her right to enforcement of the supreme court mandate.[11]

MOTION FOR MODIFICATION

Legal Standard

We now turn to the issue of the proper standard for deciding Andrew's motion. This presents an issue of statutory construction that we decide *de novo*. ***Tahtinen v. MSI Ins. Co.***, 122 Wis.2d 158, 166, 361 N.W.2d 673, 677 (1985).

Wendy argues that Andrew must show by substantial evidence that primary placement and sole custody with her would be harmful to Stephenie's emotional or physical best interest. She reasons that because the December 6, 1988 order was modified within two years, she has never had the two-year "truce period" contemplated by § 767.325(1)(a), STATS., and that the two years runs anew from the date of the April 20, 1993 supreme court decision,

[11] A petition for a writ of mandamus with respect to the ex parte temporary order could have included a request that the trial court, in addition to enforcing the supreme court mandate, establish a schedule for the transfer of custody and primary placement back to Wendy.

which reinstated that initial order.[12] We conclude that § 767.325(1)(a) does not apply and that the best interest standard of § 767.325(1)(b) governs, with certain modifications that we explain below.

Section 767.325, STATS., contains two standards for modifying legal custody and physical placement orders. Within two years of the initial order, the moving party must show by substantial evidence that the modification is necessary because current custodial conditions are physically or emotionally harmful to the best interest of the child. Section 767.325(1)(a). After two years, the moving party must show that modification is in the best interest of the child and that there has been a substantial change of circumstances since the entry of the last order affecting custody or placement. Section 767.325(1)(b). The purpose of the more stringent standard for modification of the initial custody and placement order within the first two years is to discourage modification so that the child and parents can adjust to the new family situation. ***Stephanie R. N.***, 174 Wis.2d at 764, 498 N.W.2d at 240-41. However, even after the two-year period, when the less stringent "best interest" standard applies, the legislature's intent to discourage repeated litigation of custody and placement orders is demonstrated in two ways: a substantial change of circumstances must have occurred since the last order, and the rebuttable presumption is that continuing the current custody and placement arrangement is in the best interest of the child. Section 767.325(1)(b)1 and 2.

Section 767.325, STATS., contemplates the typical situation where the child's primary placement or custody is with the non-moving party, consistent with the terms of the order sought to be modified. Thus, under § 767.325(1)(a), the moving party must show that modification is "necessary because the *current custodial conditions* are physically or emotionally harmful." (Emphasis added.) Similarly, under § 767.325(1)(b)2, the presumption is that the "*current allocation of decision making*" and "*[c]ontinuing the child's physical placement with the parent with whom the child resides*" are in the best interest of the child. (Emphasis added.) Neither provision fits the current situation--where,

[12] We assume Wendy does not mean that Andrew must show that the custodial conditions with her prior to the erroneous modification of the initial order were emotionally or physically harmful to Stephenie. The supreme court has already decided that issue in her favor. *See* ***In re Paternity of Stephanie R. N.***, 174 Wis.2d 745, 770-71, 498 N.W.2d 235, 243 (1993).

after reversal of an erroneous modification, the custody and primary placement of the erroneous order continues by stipulation.

Although neither provision fits this situation because these are the only standards for modification of custody and physical placement orders the legislature has provided, we must elect between the two. Considering the purpose of the more stringent standard, we can see little connection between that purpose and the situation here. Wendy is correct that because of the erroneous modification she never had the benefit of the initial two-year adjustment period. But no court can restore that now. Had she sought enforcement of the supreme court mandate as soon as it was entered, her argument that the initial two-year period should begin to run again from that date might have some force, although the wording of § 767.325(1)(a), STATS., would still not fit because it refers to "initial order," not "last order," as does § 767.325(1)(b).[13] However, not having sought enforcement of the supreme court mandate restoring the initial order, but instead stipulating to a continuation of the status quo pending a decision on Andrew's motion, we are not persuaded that the purpose of § 767.325(1)(a) would be served by its application to Andrew's motion.

We recognize that the application of the less stringent best interest standard in this situation runs the risk of permitting the parent who obtained an erroneous modification of an initial order to benefit from the erroneous order. For that reason, we conclude that in this situation the required "substantial change of circumstances" must be more than the fact of Stephenie's primary placement and custody with Andrew pursuant to the erroneous order. We also conclude that the rebuttable presumption of continuing the current custody and primary placement arrangements is not applicable. This presumption refers to the "last order." If that is construed to be either the initial order (that is, the last lawful trial court order) or the supreme court mandate (the last order, chronologically), the presumption makes no sense because the current actual arrangements are not consistent with either order. And we are not willing to invest the arrangements under the erroneous order with this presumption.

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[13] As noted in note 9, the dissent in ***In re Paternity of Stephanie R. N.***, 174 Wis.2d 745, 498 N.W.2d 235 (1993), stated that § 767.325(1)(b), STATS., would apply to a subsequent motion of Andrew's to modify the initial order. However, this issue was not addressed by the majority, or by the court of appeals in its decision. Therefore this statement in the dissent is not a binding resolution of the issue.

We now apply this modified best interest test to the trial court's decision.[14] In doing so, we apply the erroneous exercise of discretion standard of review. We read the supreme court's decision in ***Stephanie R. N.*** to hold that this is the proper standard for reviewing modifications of custody and placement orders. *See* ***Stephanie R. N.***, 174 Wis.2d at 765-66, 498 N.W.2d at 241. We review a discretionary decision only to determine whether the trial court examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion. ***Id.*** at 766, 498 N.W.2d at 242. Even if the trial court's exercise of discretion demonstrates a mistaken view of the law, we will not reverse if the facts of record applied to the proper legal standard support the trial court's conclusion. ***Id.*** at 767, 498 N.W.2d at 242.

Trial Court Findings and Conclusions

The trial court made the following pertinent written findings of fact: that Stephenie loves both her mother and her father, as well as her stepmother and her half-sister; that the parents' relationship, because of this proceeding, has been strained, adversarial and distressful and there is not a history of trust; that Stephenie has special needs, which include behavioral, social and emotional problems, problems in regulating her own functioning in the areas of toileting, sleeping and calming herself, speech problems, and attention problems with a possible diagnosis of attention deficit disorder (ADD); that Stephenie is sensitive to the ongoing fight between her parents, to the transition between her parents' homes, and continues to be in need of therapy; that both parents are concerned for the needs of the child; that Wendy wants "makeup time" with Stephenie and has documented the hours she has been deprived of, but that this is not a ground on which to award custody; and that Andrew and his wife are not blameless in the dispute.

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[14] It is not clear to us whether Wendy concedes that Andrew has demonstrated that he is entitled to sole custody and primary placement if § 767.325(1)(a), STATS., is not applicable. Because she is proceeding *pro se*, and because we have concluded that the proper standard is the best interest standard with certain modifications, we review the trial court's decision to determine whether it properly exercised its discretion in light of this standard. We do not understand Wendy to be contending that the trial court should have ordered joint legal custody, or should have ordered that Stephenie have more placement with her while still primarily placed with Andrew. Rather, we understand her contention to be that the trial court should have granted sole legal custody and primary physical placement to her.

The trial court's written decision simply concludes, as a matter of law, that the findings support a grant of sole custody and primary placement to Andrew, under the standards in both § 767.325(1)(a) and (b), STATS. However, the court's oral decision demonstrates that it relied on the report and testimony of the family court counselor, and on the report and testimony of Dr. Bliss in making its findings and reaching its conclusions. Accordingly, we examine that testimony to determine whether the trial court's findings and conclusions are supported by the facts of record, applying the modified best interest standard we have described above.

We note initially that the record supports the findings of fact we have recited above. Indeed, there is no dispute between Wendy and Andrew that Stephenie has a number of special needs, although they do not agree on the severity, cause and appropriate response to those needs, as we will discuss in more detail below. The real center of the controversy between the parents is which one is better able to meet her needs.

Psychologist's Report

Dr. Bliss, the court-appointed psychologist, conducted clinical interviews and performed various psychological tests on Stephenie, Andrew, Andrew's wife, and Wendy. She reviewed psychological evaluations of the three adults conducted during the proceedings in Rock County, the clinical notes of Dr. Broll, Stephenie's medical records from her infancy when she was in her mother's care, and school and preschool reports on Stephenie. She observed Stephenie with each of her parents at two separate sessions. Dr. Bliss' extensive report summarized the results of the tests and interviews.

Dr. Bliss' conclusion is that Andrew is better able to address Stephenie's significant emotional, social, behavioral and learning problems. While recognizing that Andrew can be rigid and demanding, lacking in insight as to himself, and lacking respect for Wendy, she states that he and his wife have demonstrated an understanding of the nature and degree of Stephenie's problems and a willingness to follow through with recommendations of the professionals treating Stephenie. Dr. Bliss' report states that Wendy discounts the nature and severity of Stephenie's problems, convinced that they were caused by removal from her care and that they would be corrected once Stephenie was primarily placed with her again. Wendy does not understand

that Stephenie would likely be handicapped in terms of language and development had Stephenie not been removed from her care.

Dr. Bliss' report describes Wendy as focused on her own needs and losses, at times to the detriment of her daughter. In Dr. Bliss' opinion, Wendy has undermined Stephenie's and the family's treatment in several settings in the past. She gives as one example the fact that while the family was seeing Dr. Broll, as ordered by the court, Wendy filed a complaint against Dr. Broll with the Psychology Examining Board. She did not tell Dr. Broll of this and the family continued seeing Dr. Broll for many months, until the Examining Board notified Dr. Broll. The complaint was dismissed. However, as a result of this incident and Wendy's opposition to Dr. Broll, Dr. Broll had to terminate her treatment of Stephenie.

Dr. Bliss also refers, as another example, to Andrew's compliance with the physician's recommended treatment for Stephenie's bowel problems and Wendy's disagreement with this treatment. Wendy reported Andrew to Human Services because of his use of enemas on Stephenie. The investigation of the complaint disclosed that Andrew was following the physician's instructions.

Dr. Bliss recommended that primary placement and sole custody be with Andrew. Based on the parents' history with each other, she did not think it likely that they could make decisions together regarding Stephenie. She recommended that transitions between the two homes be limited, because of Stephenie's need for stability and her vulnerability to the conflict between her parents.

Family Court Counselor's Report

The family court counselor, Arleen Wolek, interviewed Stephenie, Andrew, Wendy and the members of the household of each; had in-person and telephone conferences with Dr. Bliss, Dr. Serlin (Stephenie's current therapist) and Dr. Broll; had telephone conferences with professionals involved with Stephenie, including two physicians, a day care provider and four teachers. She reviewed documents provided by Wendy and Andrew, as well as school records, Dr. Broll's notes, letters from physicians, psychiatric and psychological evaluations from prior proceedings in Rock County, and police reports from

Rock County. She also spoke to individuals named as collateral sources by Andrew and Wendy.

Ms. Wolek's thirty-six page report explains in detail the history of the custody dispute, Stephenie's wishes, her interactions and relationships with each parent and her stepmother, her learning and behavior problems at school, her medical history, including problems with diet when she was an infant in her mother's care and more recent and persistent problems with bowel movements, her mental health, the mental health of her parents and her parents' relationship with each other.

Following are the pertinent opinions expressed by Ms. Wolek based on this factual background. Both parents love Stephenie and she reciprocates their love, although her primary attachment is to her father, stepmother and sister. Neither family supports Stephenie's relationship with the other side of the family. Andrew and his wife do not support Wendy's role as Stephenie's mother. Neither parent accepts responsibility for contributing to Stephenie's problems through their conflict with each other. Both parents are nurturing, firm and gentle with Stephenie, although Stephenie tends to obey Andrew more readily. Stephenie's multiple special needs make it difficult for her to tolerate change well. Wendy is not able to distinguish Stephenie's needs from her own. She does not consistently support Stephenie's attainment of the skills she needs to develop into an emotionally stable adult and has not been supportive of her need for counseling. She does not fully implement professional advice for Stephenie. There would be adverse effects on Stephenie if her living situation were to change dramatically, and Wendy does not understand this because she is focused on rectifying the wrongs done to her.

Ms. Wolek concludes that in her opinion it is necessary for Stephenie's best interest that Andrew be granted sole legal custody even though he may unfortunately not involve Wendy sufficiently in decision making. He is the parent who is more capable of putting Stephenie's needs first, seeking professional help for her needs and following through. Ms. Wolek also opines that it is necessary to Stephenie's best interest that Andrew have primary physical placement. Because of the parental conflict and Stephenie's substantial special needs, she needs a placement plan that minimizes the number and frequency of transitions and parental contact during transitions. Stephenie's primary placement should be with Andrew rather than Wendy because of the degree Stephenie is attached to her father, stepmother and sister and perceives

their home to be her home; and because of the much greater likelihood that her father and stepmother will continually prioritize and strive to meet Stephenie's needs. However, Stephenie's time with Wendy should be maximized by the court because, in Ms. Wolek's view, Andrew would not do this voluntarily.

Trial Testimony[15]

Both parents had the reports of Dr. Bliss and Ms. Wolek prior to trial. Dr. Bliss and Ms. Wolek testified at trial and were questioned by the guardian ad litem, Wendy and Andrew's counsel. The testimony of each was consistent with her report. Wendy did not object to the admissibility of the reports or of the opinions offered by either.

Dr. Bliss testified that the opinions, conclusions and recommendations in her report were to a reasonable psychological probability. She also testified that to a reasonable psychological certainty it would be emotionally and physically harmful to return Stephenie to the sole custody of, and primary placement with, Wendy. The emotional harm would result from the lack of structures and interventions her father is pursuing; this would have harmful physical effects as well in the sense of harm to her language and speech development, to her self-regulation, and to her eating and sleeping cycles. In response to Wendy's questioning, Dr. Bliss acknowledged that it was not a good thing for Stephenie to have been removed from Wendy's care when she was an infant and that this has something to do with Stephenie's insecurities. However, Dr. Bliss also stated that Stephenie's insecurities are caused by the conflict between her parents and, further, that many of Stephenie's problems are caused by the different way in which Stephenie processes internally. According to Dr. Bliss, it is likely that Stephenie would be having significant problems even if she had not been removed from Wendy's custody as an infant.

Ms. Wolek testified that in addition to the other materials listed in the report, she had read the depositions of Wendy, Andrew and the three friends and family members of Wendy who had been deposed. She stated that her opinions in her report and in her trial testimony were to a reasonable professional probability. She opined that Stephenie would be emotionally

[15] Both parents and their family members and friends testified, as well as Dr. Bliss, Ms. Wolek, two teachers of Stephenie's, and a social worker from Rock County.

harmed if sole legal custody and primary physical placement were with Wendy and it was necessary to Stephenie's emotional health for sole custody and primary physical placement to be with Andrew. Ms. Wolek recognized the need for Stephenie to have time with her mother; but it was her opinion that a more compelling need was that Stephenie have a primary base so that she could make progress in dealing with her educational, emotional and developmental goals. In Ms. Wolek's opinion, her recommendation for time with Wendy will permit Wendy to be involved in Stephenie's life and to have a bonded, positive relationship with Stephenie. The guardian ad litem concurred with Ms. Wolek's recommendation.

The testimony of Wendy and of her witnesses did not, for the most part, contradict the facts related in Ms. Wolek's and Dr. Bliss' reports. Wendy's testimony did dispute Ms. Wolek's interpretation of an event Ms. Wolek observed in Wendy's home in which Stephenie was drinking from a baby bottle. Wendy also submitted a letter from Dr. Judd, a pediatric gastroenterologist, summarizing his evaluation of Stephenie in August 1988, and indicating that Stephenie's reactions to certain foods are indicative of allergies but that there are no allergy tests for someone Stephenie's age. Apparently, Wendy felt this letter contradicted the views expressed by Stephenie's former pediatrician and by Dr. Judd, mentioned in Ms. Wolek's report, that Wendy had not accepted medical advice regarding Stephenie's diet.[16]

Wendy testified, both in deposition and at trial, that she believed that a lot of Stephenie's problems, including the language processing problem, were caused by Stephenie's removal from her care as an infant and by being in Andrew's home. This belief was based on her own observations. She acknowledged that this was not the view of Ms. Wolek, Dr. Bliss or Dr. Serlin. Wendy agreed that Stephenie considered her father's home as her home and that primary physical placement with her would be a big adjustment for Stephenie and would require therapy over a period of time to help Stephenie deal with it. Much of Wendy's testimony related to the circumstances under

[16] The records of Stephenie's day care provider, Kristine Hanson, from April through August, 1989, to which the dissent refers, were submitted as exhibits in the December 13, 1989 hearing before the Rock County Circuit Court. Neither Wendy nor Andrew referred to these records in the proceedings on Andrew's motion of May 21, 1993, filed in Dane County Circuit Court. These records were neither mentioned nor presented at the hearing in August 1994, nor, it appears, were they brought to the attention of Arleen Wolek during the study she conducted. Hanson was not a witness in the Dane County proceedings.

which Stephenie had been removed from her care and to Andrew's efforts over the years to limit her contact with Stephenie and her role in Stephenie's life.

Application of Legal Standard

The trial court determines the weight to be given the report of social workers and psychologists in custody disputes. *See* ***Larson v. Larson***, 30 Wis.2d 291, 300, 140 N.W.2d 230, 236 (1966). Obviously, the trial court gave great weight to Ms. Wolek's report and testimony and to Dr. Bliss' report and testimony. It was entitled to do so. Their reports were detailed and revealed a factual basis for their opinions and conclusions, a factual basis that was not significantly disputed by the testimony Wendy presented at trial. Ms. Wolek and Dr. Bliss did take into account in their reports and recommendations the ways in which Andrew did not show respect for Wendy and inappropriately attempted to limit her role.

The trial court did not expressly address the issue of whether there was a substantial change of circumstances since the December 6, 1988 order, but implicitly it determined there was. As we have stated above, in these circumstances we will require that the substantial change in circumstances be something other than the fact that Stephenie's primary placement and sole custody was transferred to Andrew under the erroneous modification. We hold that Ms. Wolek's report, Dr. Bliss' report and the testimony at trial support the conclusion that there was a substantial change of circumstances since the initial order in addition to the transfer of sole custody and primary placement from Wendy to Andrew. It is undisputed that since the initial order, Stephenie has developed a number of special needs that require educational, speech, psychological and medical intervention.

We also conclude that the two reports and the testimony at trial support the conclusion that it was in Stephenie's best interest to remain primarily placed with Andrew in his sole custody, without investing the continuation of that arrangement with the force of a rebuttable presumption. There was ample evidence of Stephenie's fragility, her special needs, the probable negative effects on her of a change in her primary placement, and Andrew's greater willingness to seek necessary professional help for Stephenie and to follow recommendations for interventions and treatment. The trial court was entitled to rely on the opinions of Ms. Wolek, Dr. Bliss and other

professionals concerning the cause of, and treatment for, Stephenie's special needs rather than accepting Wendy's view.

Since the proper legal standard, when applied to the facts of record, supports the trial court's grant of sole legal custody and primary physical placement to Andrew, we affirm that conclusion. We do not make this decision lightly. We acknowledge the appeal of Wendy's contention that because Stephenie was wrongfully removed from her care, and because her time with Stephenie was restricted in the past, she should have primary placement and sole custody now. The limitation with this approach is that this dispute concerns not only Andrew and Wendy but, most centrally, Stephenie. Our primary concern must be with the best interest of the child.

There is one additional matter that requires discussion. In his affidavit filed in support of the order to show cause, Andrew stated:

> The Rock County Circuit Court found "substantial evidence" of child abuse; petitioner believes that a strong possibility exists that sexual abuse, excessive corporal punishment and other physical abuse occurred during the period Stephenie [N.] resided with respondent and during subsequent unsupervised visitation.

In its April 20, 1990 order, the Rock County court stated as a conclusion of law:

> That there is substantial evidence that child abuse occurred during visitations with Respondent [Wendy] which were emotionally harmful to the best interest of Stephanie [N.].[17]

[17] The supreme court did not discuss this conclusion, presumably because the court concluded that evidence of conditions existing after the child is removed from its "current custodial conditions" is relevant only if it bears on the care the child received under the initial order. ***In re Paternity of Stephanie R. N.***, 174 Wis.2d 745, 762, 498 N.W.2d 235, 240 (1993).

Andrew testified at his deposition in the Dane County proceeding that he had noticed bruises on Stephenie's legs, arms, bottom and back when she came back from visitations with Wendy and that Stephenie had once, when in the bathtub, put a handle of a toy pan to her vagina and said "Ow, it hurts." This occurred in 1989. He testified that he thought this was the basis for the Rock County court's finding. However, Andrew acknowledged both at his deposition and at trial that, although he had reported his suspicions to Stephenie's physician, he was never able to substantiate his suspicions.

We find disturbing that in his affidavit for an ex parte order in 1993, Andrew would repeat his "beliefs" about physical and sexual abuse based on incidents that occurred in 1989, knowing that in the five intervening years nothing occurred to corroborate or substantiate his beliefs. We understand that in a custody dispute, out of genuine concern for the child, a parent may consciously or unconsciously exaggerate the dangers and weaknesses of the other parent. But unsubstantiated beliefs of this nature that are five years old, have no place in a document filed in court. On remand, we direct that the trial court strike Paragraph 16 of Andrew's Affidavit in Support of Order to Show Cause.

By the Court.—Judgment affirmed and cause remanded with directions.

Not recommended for publication in the official reports.

No. 94-3268(C)

GARTZKE, P.J. (*concurring*.) Our decision is consistent with the reasoning in ***In re Custody of H.S.H.-K., Holtzman v. Knott***, 193 Wis.2d 649, 533 N.W.2d 419 (1995). The ***Holtzman*** court concluded that when the visitation statute, § 767.245, STATS., 1991-92, did not apply to Holtzman's circumstances, the circuit court could nevertheless grant visitation if it is in the child's best interest and if court-created requirements are met. ***Id***. at 658, 533 N.W.2d at 421. Relying heavily on and quoting from ***Dovi v. Dovi***, 245 Wis. 50, 13 N.W.2d 585 (1944), the ***Holtzman*** court said,

> Courts have jurisdiction in equity apart from the divorce statute to act in the best interest of a child, wrote the ***Dovi*** court. The protection of minors is one of the "well established grounds for the exercise of equity jurisdiction." ***Dovi***, 245 Wis. at 57, 13 N.W.2d 585. The repealed statute "merely made applicable to divorce actions a jurisdiction which equity courts already possessed and which might have been exercised without the aid of a statute." ***Dovi***, 245 Wis. at 57, 13 N.W.2d 585. Because the statute "did not confer jurisdiction upon the court," its repeal left the courts' equitable jurisdiction over children where it was before the statute was enacted. ***Dovi***, 245 Wis. at 55, 13 N.W.2d 585. Similarly in the case at bar, the enactment of the visitation statutes did not preempt the court's equitable jurisdiction over visitation in circumstances not included in the statutes.

193 Wis.2d at 687-88, 533 N.W.2d at 432-33 (footnotes omitted).

Holtzman is precedent for our decision. The ***Holtzman*** court dealt with a visitation problem not covered by statute. We deal with a custody problem not covered by statute. The ***Holtzman*** court employed equitable powers to devise a best interest standard for the circuit court to apply. So have we.

The ***Holtzman*** court remanded the matter before it for the trial court to determine whether visitation is in the child's best interest under the test the supreme court devised. 193 Wis.2d at 699, 533 N.W.2d at 437. Except for a

minor matter, we affirm the trial court's ruling without a remand. We are able to do so because the record made before the circuit court is adequate for us "to determine whether the trial court's findings and conclusions are supported by the facts of record, applying the modified best interest standard we have described above." [Sheet 24] And we have concluded on the basis of the record that the modified best interest standard applied to the facts supports the circuit court's grant of custody and primary physical placement to Andrew. [Sheet 36]

No. 94-3268(D)

SUNDBY, J. (*dissenting*). In this paternity action, the mother appeals from an order entered by the Dane County Circuit Court granting the father's motion under § 767.325(1)(b), STATS.,[18] to transfer legal custody and primary physical placement of Stephenie R.N. from her mother, Wendy D., to her father, Andrew R.N. The former guardian ad litem, Tod Daniel, and the father previously attempted this modification of the initial custody and physical placement order by motion to the Rock County Circuit Court under § 767.325(1)(a), STATS.[19] In ***In re Paternity of S.R.N.***, 167 Wis.2d 315, 481 N.W.2d

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[18] Section 767.325(1)(b), STATS., provides:

> (1) SUBSTANTIAL MODIFICATIONS....
>
> (b) *After 2-year period*. 1. Except as provided under par. (a) and sub. (2), upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:
>
> a. The modification is in the best interest of the child.
>
> b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.
>
> 2. With respect to subd. 1., there is a rebuttable presumption that:
>
> a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.
>
> b. 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.

[19] Section 767.325(1)(a), STATS., provides:

> (1) SUBSTANTIAL MODIFICATIONS.
>
> (a) *Within 2 years after initial order*. Except as provided under sub. (2), a court may not modify any of the following orders before 2 years after the initial order is entered under s. 767.24, unless a party seeking the modification, upon petition, motion, or order to show cause shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best

672 (Ct. App. 1992), *aff'd*, ***In re Paternity of Stephanie R. N.***, 174 Wis.2d 745, 498 N.W.2d 235 (1993), we set aside orders transferring legal custody and primary physical placement of Stephenie from her mother to her father as a sanction for her alleged interference with the father's visitation. We concluded that the guardian ad litem and the father failed to show by substantial evidence that Stephenie's current custodial conditions were physically or emotionally harmful to her best interest.

The mandate of the supreme court affirming our decision read:

> We reverse the trial court's temporary and permanent modification orders. Primary placement and sole legal custody of this child should be returned to the mother in accord with the initial, December 6, 1988, custody order.

In re Paternity of Stephanie R. N., 174 Wis.2d 745, 774, 498 N.W.2d 235, 245 (1993).

However, the circuit court by an *ex parte* order temporarily stayed execution of the supreme court's mandate. The supreme court announced its decision April 21, 1993. On May 20, 1993, the father moved the Dane County Circuit Court under § 767.325(1)(b), STATS., to modify the December 6, 1988,

(..continued)

interest of the child:

1. An order of legal custody.

2. An order of physical placement if the modification would substantially alter the time a parent may spend with his or her child.

custody order to transfer sole legal custody and primary physical placement of Stephenie to him. He then moved the supreme court to reconsider its mandate and remand the case to the Dane County Circuit Court for further proceedings on his new motion. The supreme court denied his motion June 8, 1993.

The father then obtained an *ex parte* order from the Dane County Circuit Court staying the supreme court's mandate and ordering the mother to show cause on July 27, 1993, why the initial custody order should not be amended to award custody of Stephenie to him while the court heard his motion.

CIRCUIT COURT COMPETENCE

(a) *Mandatory Mediation*.

Although this appeal presents many issues, it is necessary to first determine whether there is a legitimate, final order which we may review. I conclude that there is not because the trial court was not competent to hold a hearing or trial of the father's motion or enter an order under § 767.325(1)(b), STATS., affecting Stephenie's custody[20] until mediation was completed or found inappropriate.

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[20] In ***S.R.N.*** and ***Stephenie R.N.***, the parties and the circuit court gave the terms "custody" and "visitation" their pre-1987 Wis. Act 355 meanings. In its deliberations and comments, the Legislative Council's Special Committee on Custody Arrangements frequently used the term "custody" to include "sole physical custody." Wisconsin cases decided pre-1987 Wis. Act 355 and decisions from other jurisdictions use "custody" in that sense. Unless otherwise stated, "custody" and "visitation" in this opinion include their pre-1987 Wis. Act 355 meanings.

Section 767.11(5)-(10), STATS., created by 1987 Wis. Act 355, requires mediation if the non-custodial parent seeks to alter legal custody or substantially alter the time the parent may spend with his or her child, and the modification is contested. Section 767.11(5)(a) and (6) requires the court or court commissioner to refer a contested modification to the director of family court counseling services who "shall" assign a mediator to the case. "The mediator shall provide mediation if he or she determines it is appropriate. If the mediator determines mediation is not appropriate, he or she shall so notify the court." Section 767.11(6). However, the mediator may not determine that mediation is not appropriate except after the initial session which both parties shall attend. Section 767.11(8)(a). "The initial session under par. (a) shall be a screening and evaluation mediation session to determine whether mediation is appropriate and whether both parties wish to continue in mediation." Section 767.11(8)(c). Section 767.11(8)(a) provides in part: "[I]f the parties and the mediator determine that continued mediation is appropriate, no court may hold a trial of or a final hearing on legal custody or physical placement until after mediation is completed or terminated."

All duties under § 767.11(5)-(10), STATS., with respect to mediation are imposed by the word "shall." "Shall" generally imposes a mandatory rather than a discretionary duty. ***In Interest of R. H.***, 147 Wis.2d 22, 25-27, 433 N.W.2d 16, 18 (Ct. App. 1988), *aff'd by equally divided court*, 150 Wis.2d 432, 441 N.W.2d 233 (1989).

"Mandatory" means: "1. authoritatively ordered; obligatory; compulsory .... 3. *Law*. permitting no option; not to be disregarded or modified ...." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1167 (2d ed. 1987).

I do not believe the mediation statute can reasonably be construed as directory.

The *ex parte* order to show cause provided in part:

> **IT IS FURTHER ORDERED** that this matter be referred forthwith to Dane County Family Court Counseling Service for expedited evaluation and recommendation regarding temporary custody and placement at the time and date scheduled, as well as a final custody and placement evaluation and recommendation, and that *under DCCCR [Dane County Circuit Court Rule] 410 (a) mandatory mediation is waived* based upon the lengthy record of the parties' inability to agree on issues relating [to] the minor child's best interests as expressed in the attached affidavit with attachments.

(Emphasis added.)

The Dane County Circuit Court Rules (DCCCR) were promulgated by the Chief Judge at the request of the Dane County circuit judges. DCCCR 100: General. Rule 410(A) provides in part:

> *Mandatory Mediation*.
> Mandatory mediation shall be conducted through the office of the Family Court Counseling Service and shall consist of a group orientation session and a private meeting between the couple and a counselor. No fee will be assessed for these two sessions.
>
> *Mandatory Mediation Waiver*.
> Waiver of mandatory mediation may be granted by a judge, or a family court commissioner upon examination of an affidavit if the affidavit presents

> sufficient evidence to support the waiver. If a party objects to the waiver, an evidentiary hearing will be conducted by the family court commissioner. Upon request, there will be a judicial review based on the taped recording of the evidentiary hearing.
>
> Waiver of the mandatory mediation session does not excuse attendance at the orientation session; it modifies only the requirement for both spouses to be present at the same session.

Dane County's system appears to have antedated the 1987 legislation. Prior to the enactment of 1987 Wis. Act 355, circuit courts were free to provide a procedure by which court commissioners and courts could waive court-annexed mediation. However, after the creation of § 767.11(5)-(10), STATS., the mediation procedure may not be waived by the parties, the family court counseling service or the court, except where mediation would be harmful to either party, § 767.11(8)(b).

Section 753.35(1), STATS., provides in part: "A circuit court may, subject to approval of the chief judge of the judicial administrative district, adopt and amend rules governing practice in that court *that are consistent with ... statutes relating to pleading, practice and procedure.*" (Emphasis added.) This rule did not create new law but clarified existing law. Prior to the study by the Special Committee on Custody Arrangements, it was conventional wisdom that mediation was futile if the relations between the parties were hostile. The family court's attempt to waive mediation was based on that wisdom. However, the Special Committee relied on empirical evidence which showed that mediation of child custody disputes was more effective than litigation regardless of "the anger and polarization of divorcing or separating parents." 1987 Wis. Act 355, FINDINGS.

I therefore conclude that the circuit court could not waive mediation and could not hear the father's motion until mediation was concluded or found inappropriate.

(b) *Trial Court's Competence to Stay Supreme Court's Mandate.*

The mother argues that the trial court could not require her to show cause why the supreme court's mandate should not be stayed because the court was bound to carry out the supreme court's mandate. I agree.

"Ours is a hierarchical judiciary, and judges of inferior courts must carry out decisions they believe mistaken." ***Gacy v. Welborn***, 994 F.2d 305, 310 (7th Cir.) (citing ***Hutto v. Davis***, 454 U.S. 370, 375 (1982)), *cert. denied*, 114 S. Ct. 591 (1993). Therefore, the trial court lacked competence to stay the mandate of the supreme court. Upon remittitur, the court had a responsibility to see that the mandate was carried out.

The father and the guardian ad litem argue, however, that the mother waived her right to have that mandate carried out because she participated in these proceedings and then, being unsuccessful, tried to revive the supreme court's mandate. The father and the guardian ad litem argue that the mother stipulated away her rights to enforce the supreme court's mandate. Their argument does not survive examination. The mother filed a motion to dismiss the father's motion in the Dane County Circuit Court and a motion to enforce the supreme court's mandate in the Rock County Circuit Court. This excess of caution resulted from the erroneous remittitur of the record to the Dane County Circuit Court. The case was venued in Rock County. Her motions were never acted on. However, the mother did not stipulate that she would be bound by the result of the proceedings on the father's motion. She simply stipulated that she would not attempt to enforce the supreme court's mandate during the course of the proceedings. She was asked what she hoped to get out of these proceedings. She answered that she sought to have

Stephenie's placement with her gradually increased until it would be appropriate for her to exercise her primary placement rights. The trial court's explanation of its understanding of the stipulation squares with the mother's understanding. The trial court described this as a "stepping" process.

The father and the guardian ad litem argue that the mother has taken inconsistent positions. In other words, she is judicially estopped from now enforcing the supreme court's mandate. The doctrine of judicial estoppel is intended to protect against a litigant playing "`fast and loose with the courts' by asserting inconsistent positions." ***State v. Fleming***, 181 Wis.2d 546, 557, 510 N.W.2d 837, 841 (Ct. App. 1993) (quoting ***Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council***, 851 F.2d 1208, 1210 (9th Cir. 1988)). The mother's position has always been consistent and has always been known. She is in no different position from any other defendant whose motion to dismiss on legal grounds, (for example, insurance coverage), is denied and is forced to defend against the claim. It is not unusual for a party whose motion for summary judgment on legal grounds is denied to prevail on that motion after trial. A litigant who loses at trial does not thereby lose the right to invoke the legal grounds upon which he or she sought to dismiss a claim.

(c) *Our Duty to Determine Competence*.

The mother does not challenge the trial court's competence. However, it is our duty to satisfy ourselves as to the jurisdiction of the trial court without the matter having been urged by counsel. ***Anchor Savings & Loan Ass'n v. Coyle***, 145 Wis.2d 375, 391, 427 N.W.2d 383, 389 (Ct. App. 1988) (citing ***Harrigan v. Gilchrist***, 121 Wis. 127, 224, 99 N.W. 909, 932 (1904) ("It is not only proper for this court, but it is its duty, to make all investigations necessary to satisfy itself in regard thereto [jurisdiction of trial court] with reasonable certainty.")), *rev'd on other grounds*, 148 Wis.2d 94, 435 N.W.2d 727 (1989).

The ***Harrigan*** court stated:

> [It is] the duty of the judiciary to set, most significantly, an example of submission to the law .... It is doubtful whether a court would be justified under any circumstances in assuming jurisdiction of a subject matter which neither the law gives nor the parties could bestow by consent, by either neglect or refusal to take its bearings in that regard, by the limitations upon its power set by the organic act by which it was created.

121 Wis. at 225, 99 N.W. at 932-33.

The trial court's attempt to waive mediation is surprising in view of the court's assessment of the relative merits of mediation and litigation. At the close of trial, the trial judge observed: "This is not the way to settle disputes. The way to settle disputes and get a determination is through mediation downstairs. Especially in these types of things ...."

The legislature has forbidden the family court to hold a hearing or trial or enter an order modifying custody until mediation is completed or discontinued as inappropriate. *See* § 767.11(8)(a), STATS. The Dane County Circuit Court therefore lacked competence to enter an order or judgment on the father's motion because mediation was not completed or terminated.

MEDIATION AND JOINT CUSTODY

(a) *Mediation*.

1987 Wis. Act 355 represents a revolution in the legislature's thinking with respect to resolving child custody disputes. By 1983 Assembly

Joint Resolution 106, the legislature created a Special Committee on Custody Arrangements. The Special Committee operated under the aegis of the Legislative Council and reported to it. The Committee made notes to the bill enacted by the 1987 legislature, which are included as notes to 1987 Wis. Act 355. The Committee made findings as follows:

> In its study, the special committee on custody arrangements concluded that the current laws and practices relating to child custody determinations in divorce and other actions affecting the family:
>
> ....
>
> 2. Often increase the anger and polarization of divorcing or separating parents by emphasizing the adversarial nature of custody determinations, instead of providing the parents with the information and dispute resolution mechanisms necessary to plan for the future care of their children.
>
> 3. Encourage the use of joint child custody as a bargaining chip by permitting one parent to veto joint custody, despite the willingness of both parents to maintain an active role in raising their children and despite the apparent ability of the parents to cooperate in the future decision making required by an award of joint custody.

1987 Wis. Act 355, FINDINGS.

To decrease this "anger and polarization" and to provide for the effective use of joint custody, the Committee recommended and the legislature

adopted a mandatory mediation procedure under § 767.11(5)-(10), STATS., administered by the family court counseling service. 1987 Wis. Act 355, PROVISIONS OF THE BILL.

The Committee also recommended and the legislature adopted § 767.24(2), STATS., which empowers the family court to give the parents joint legal custody upon the request of one of the parents. Formerly, either parent could veto joint legal custody.

Prior to 1987 Wis. Act 355, divorcing or separating parties were required to participate in counseling. The Committee concluded that that approach was not working and studied mandatory mediation as an alternative. Wisconsin Legislative Council, *Custody Arrangements,* Memo No. 7, October 8, 1984, *General Discussion of Concept and Use of Mediation in Divorce and Other Actions Affecting the Family.* The Legislative Council staff found that at least 23 states, including Wisconsin, had some type of court-connected mediation services. ***Id***. at 2. The staff also noted that according to a 1983 survey by the Wisconsin Interprofessional Committee on Divorce, 29 counties in Wisconsin had some type of mediation available in custody matters. ***Id***. at 3. Of this number, 16 counties had a formalized mediation program, "where the court has sanctioned mediation and uses its judicial powers to direct parties through the system." ***Id***.

The Legislative Council staff reported to the Committee the results of a comprehensive study of mediation of custody disputes by the Denver Custody Mediation Project. Memo No. 7 at 7-8. The study found that: (1) the mediation group was by far more successful in reaching agreements than the control group consisting of persons who participated only in the adversarial process; (2) those who mediated were much more satisfied with the fairness of the final agreements; (3) the parties were less likely to have problems complying with the agreements; (4) relations between ex-spouses with mediated custody/visitation agreements were improved; (5) a significantly greater

number of mediation couples arrived at joint child custody arrangements; and (6) mediation saved time and money. ***Id***.

The Legislative Council staff identified other arguments for mediation: (1) flexibility; (2) enhances a child's adjustment; (3) encourages child support payments; (4) teaches how to resolve future disagreements; and (5) reduces costs of the court system in resolving custody disputes. ***Id***.

The Committee opted for mandatory mediation:

> *Mandatory Referral to Mediation*. In any action affecting the family, where it appears that either legal custody or physical placement, or both, are contested, the court or family court commissioner ... would be required to refer the parties to mediation services for mediation of the contested issues.... *The mediation would have to be completed or terminated prior to any trial of or final hearing on the mediated issues.*

Legislative Council, *Custody Arrangements*, Memo No. 17, April 30, 1985, n.5 (emphasis added).

(b) *Joint Custody*.

Corollary to and consistent with mandatory mediation is the change in legislative attitude toward joint custody. The Committee concluded:

> *Joint Custody*

> ... The Committee found that, while past empirical research is insufficient to warrant a presumption or a preference for joint custody in all or even some cases, there is substantial research emphasizing the importance of the *child's continuing contact and relationship with both parents* after the parents have divorced or separated. If granted in appropriate circumstances, joint custody is an effective means to foster such continuing contact and relationship with both parents.[21]

Special Committee Report to Legislative Council, Report No. 13, September 24, 1985, at 10 (emphasis added).

The bill which became 1987 Wis. Act 355 was prepared by the 1984-85 Special Committee on Custody Arrangements, pursuant to 1983 Assembly Joint Resolution 106.

> The Committee was directed to review existing laws relating to child custody determinations in actions affecting the family. In particular, the Committee was directed to study ways to encourage shared parenting options, *including imposing joint custody*

[21] Section 1 of 1987 Wis. Act 355 declares: "The legislature declares that it is the public policy of this state that unless there is a specific reason to the contrary it is in the best interest of a minor child to have frequent associations and a continuing relationship with both parents." The Committee's Note to this section states: "Emphasizes the basic concept underlying many of the changes in this interest of a child to have a close, continuing relationship with both parents where the parents have divorced or separated." The emphasized language in the Committee's comment on joint custody seems to refer to physical placement as well as joint legal custody.

> *without the agreement of the parties* and ways to provide support services to family in custody matters to ensure that the best interest of the child continues to be served after a child's parents become divorced or separated.

Wisconsin Legislative Council Report No. 2 to the 1987 Legislature, *Legislation on Custody Arrangements*, 1987 Assembly Bill 205, Legislative Council Staff, March 11, 1987, RL 87-2 (emphasis added).

I conclude that the legislature has attempted to defuse the animosity between separating parents by requiring mediation before litigation and using joint custody as a tool to implement involvement of both parents in their child's life.

It now appears fortuitous that the family court did not require mediation of the father's motion. Mediation now is more likely to be acceptable to the parties and profitable. Almost two-and-one-half years have gone by since the father filed his latest motion. Stephenie is now eight years old and has a sense of time which allows greater flexibility in physical placement. *See* NATIONAL COUNCIL OF JUVENILE AND FAMILY JUDGES, CHILD DEVELOPMENT: A JUDGE'S REFERENCE GUIDE 27 (1993).

While the parties may have gone to "war" initially, there are signs that mediation and joint custody may effect the truce the parties and Stephenie need so badly.[22] The mother knew that she could have gone to the order-to-

[22] At the close of testimony, the father's attorney informed the court that they would agree to the family court counselor's recommendation which included extra overnight placements of Stephenie with her mother. He also stated that the mother "sounded ... pretty forthright ... that she would be willing to work on the communication issue, and to seek counseling to that end." He further informed the court that the father was "certainly

show-cause hearing, presented the mandate of the supreme court, and insisted that the father surrender Stephenie to her. She could have required the assistance of the court for that purpose. Instead, she recognized from her own tragic experience that an abrupt change of custody and physical placement to her might trigger the kind of trauma Stephenie suffered when she was taken from her. Her maturity in placing Stephenie's needs before her own is encouraging.

Drs. Ian Russ and Martin Stein suggest that by the time a child is eight years old, he or she has some temporal recognition. CHILD DEVELOPMENT at 27. This makes it possible to consider a different living arrangement; they suggest that the child live with each parent for a week at a time. This is an incentive where the parents are still angry and fighting. "Fewer exchanges of the children means less contact with the other parent and this is usually advantageous." ***Id***.

> The best plans try to incorporate the developmental needs of the children with the scheduling and emotional needs of the parents.... The plans that work the best are ones in which the child's needs are central and the parents are willing to make it work with a minimum of anger and resentment. A custody plan that places the child's needs as central will be detrimental to the child if the parents continue to fight and use the child as an instrument of their anger.... It can take one to two years before the new families settle into a routine around children alternating between homes.

Id. 27-28. It was undoubtedly this phenomenon which caused the legislature to provide for the two-year "time-out" period after entry of the initial legal custody

(..continued)

willing to back off."

and physical placement order. The father's selfish act which punished the mother by removing Stephenie from her care also punished Stephenie. It may not be too late to recapture the bubbly, loving child the mother created through her care of Stephenie. The mother is mature enough to recognize that the principal goal of a parent is to consistently reinforce her child's self-esteem. Upon questioning by the court, the mother testified: "I have seen a difference in her attitude about herself when she feels she looks nice. I think that a clean and neat appearance does a lot for her self-esteem."

The mother testified that after she was able to have more time with Stephenie, including over-night visitation, her bond with Stephenie became "far stronger."

The father, however, must be warned that he may not continue his efforts to substitute his wife, Shauna, for Wendy as Stephenie's mother. Shauna must be cautioned that her efforts to subvert Stephenie's relationship with her mother must cease. Wendy is Stephenie's mother whether Andrew or Shauna like it or not.

STANDARD FOR CHANGE OF CUSTODY

It is the most overworked cliche in the law that "Ignorance of the law is no excuse." Paradoxically, in this case, ignorance of the law "excuses" Andrew from showing changed circumstances and rebutting the presumption which would have arisen had Stephenie remained with her mother during the two-year period of "time-out" or "truce" mandated by § 767.325(1)(a), STATS. *See* ***Stephanie R.N.***, 174 Wis.2d at 764, 498 N.W.2d at 240-41. If guardian ad litem Daniel and the father had known that the standard under § 767.325(1)(a) made it impossible for the family court to order a change of custody in the two years after the initial order, this tragedy could have been avoided. If the trial court had been properly advised as to the law, it would not have "temporarily" transferred custody of Stephenie to the father.

Section 767.325(1)(a), STATS., requires a two-year period of adjustment after entry of the initial custody decree. Two years have gone by, but the father and guardian ad litem have seriously encroached on that period by the orders we have set aside. What is the proper response when a literal application of a statute leads to an unexpected and inequitable result?

The case of "Baby Richard" provides guidance in the area of child custody. In ***In re Petition of Kirchner***, 649 N.E.2d 324 (Ill. 1995), Otakar Kirchner (Otto) returned from Czechoslovakia after a short visit and was told that his child had died at birth. Otto was suspicious and attempted to discover the truth. Fifty-seven days after the birth of Richard, the mother admitted that their child had been born and was being adopted. On June 6, 1991, Otto appeared by counsel and objected to the adoption. The Illinois Supreme Court held that at this point the adoption proceedings "were rendered wholly defective." ***Id***. at 327. The court said: "On June 6, 1991, the Does [the adoptive parents] had both a legal and moral duty to surrender Richard to the custody of his father." ***Id***. The court pointed out that Richard was then less than three months old but the Does selfishly "prolonged these painful proceedings to the child's fourth birthday and have denied Otto any access to his own son." ***Id***.

Likewise, upon issuance of the Wisconsin Supreme Court's mandate, Andrew had both a legal and moral duty to return Stephenie to her mother.

In the "painful proceedings" before the Illinois courts, the trial court found that Otto was unfit because he "fail[ed] to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth." 649 N.E.2d at 327 (citing 750 ILCS 50/1(D)(1), 8(a)(1) (West 1992)). In essence, the trial court concluded that Otto's efforts were insufficient because he did not contact a lawyer in that thirty-day period. ***Id***.

The Does argued that it was in Richard's best interest to remain with them. The Illinois Supreme Court rejected this argument because the adoptive parents had gotten physical possession through "lies, deceit and subterfuge." 649 N.E.2d at 328. The court said: "In simple terms, Richard is in the Does' home without color of right." ***Id***. at 335. The Does had physical possession of Richard but not his custody. ***Id***. The court said that the Does did not have standing to assert a right to custody of Richard because their only authority was the passage of time. ***Id***.

There are striking parallels between our case and "Baby Richard." Stephenie, in simple terms, has been in the father's home for six years under an invalid custody order, and remains there. While the father could move the family court for modification of custody after the Rock County court's orders were set aside, as he did, he could not by the invalid orders create the changed circumstances or extinguish the presumption of continuity which § 767.325(1)(b)l and 2, STATS., require.

The trial court's order must be reversed because it did not apply the "best interest" standard under § 767.325(1)(b), STATS. That standard is not the same as the "best interest" standard which the family court must apply to an initial determination. To show changed circumstances, the father relied on the custody of Stephenie he obtained through orders which were invalid under § 767.325(1)(a).

The father is in much the same circumstance as the Does: He sought a change of Stephenie's custody under § 767.325(1)(a), STATS., when he knew or should have known that no grounds existed for modification of custody. A non-custodial parent may not "boot-strap" his or her custodial claim by obtaining and retaining custody of a child through unlawful or invalid means.

The Illinois Supreme Court's conclusion as to the "Baby Richard" case is apt here:

> It would be a grave injustice not only to Otakar Kirchner, but to all mothers, fathers and children, to allow deceit, subterfuge and the erroneous rulings of two lower courts, *together with the passage of time resulting from the Does' persistent and intransigent efforts to retain custody of Richard*, to inure to the Does' benefit at the expense of the right of Otto and Richard to develop and maintain a family relationship.

649 N.E.2d at 339-40 (emphasis added).

It would be a grave injustice to allow Andrew to gain a custodial advantage over the mother simply through possession of Stephenie pursuant to the orders we have invalidated. It would be inconsistent with the legislature's protection of the new family during the two years following the initial custody order to allow the non-custodial parent to disrupt that relationship by frivolous attempts to alter custody. Having chosen to make that attempt and failed, the father must accept that time is not relevant until the two-year period of adjustment has run its natural course.

Unfortunately, regardless of our resolution of these legal issues, we cannot by judicial fiat stop these parties from continuing to litigate the custody issues. The only way to still this strife is to have the parties agree to a final resolution. I believe they may both be amenable to mediation and settlement. The overriding consideration is Stephenie's best interest. Plainly, her best interest is served by an agreement hammered out by her father and mother rather than an uneasy, and undoubtedly, temporary truce. Enough

blood has been spilled on this battlefield. *See* ***S.R.N.***, 167 Wis.2d at 343, 481 N.W.2d at 684.

BEST INTEREST FACTORS

We need not, and should not, reach the merits. However, I do so for two reasons. First, the majority has done so. Second, the parties should be aware in mediation that neither can be sure of the result of this legal action or any future attempts to modify custody through the adversarial process.

The introductory paragraph to § 767.24(5), STATS., provides:

> FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS. 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 the following factors in making its determination: ....

(Emphasis added.) However, § 767.24 applies only to the initial order or judgment. Section 767.24(1). Section 767.325(1)(b), STATS., does not refer to § 767.24. However, the family court counselor considered most of the § 767.24(5) factors. Because the Dane County Circuit Court adopted the family court counselor's findings as its findings, we review her findings as if they were the court's findings.

The counselor concluded that:

> Stephenie should remain in her father's primary care for reasons that include a) the degree to which she is attached to

> her father, stepmother and sister, b) the fact that she perceives her father's home to be her home, [and] c) the much greater likelihood that her father and stepmother will continually prioritize, and strive to meet, Stephenie's needs.

She based her conclusion on the following § 767.24(5), STATS., factors:

(a) *The wishes of the child*.

Stephenie and her mother are gradually renewing a warm, loving, parent-child relationship, over the father's vehement objections, who seeks to substitute his wife for Wendy as Stephenie's mother and has even suggested to Stephenie that visitation with her mother may not be safe. Stephenie is experiencing mixed emotions at this time where her loyalty is being demanded by her father and his wife, but simultaneously, she enjoys visiting her mother.

(b) *Stephenie's interaction/interrelationship with her mother*.

The family court counselor found that Stephenie was positively attached to her mother and enjoyed placement in her mother's home.

> [The mother] is calm and nurturing with Stephenie. She is also very creative and teaches skills, such as embroidery, to Stephenie. There were very positive observations during [the mother's] home visit. Stephenie often cuddled next to her mother on the couch. [The mother] maintains a mailbox just for Stephenie, who immediately and excitedly went to it to obtain mail

> she had received since the last time she was at her mother's home.

The counselor reported that Stephenie's therapist found that Stephenie is genuinely attached to her mother:

> "She calls her `Mama Wendy' and slips into calling her `Mom.' I don't think this is a reflection of what Wendy wants to hear but due to attachment." Dr. Serlin does not believe that [the mother] fosters dependency in Stephenie contrary to the concerns that [the father] and [his wife] raise when they meet with Dr. Serlin. Furthermore, Dr. Serlin said that "[The mother] is attentive, responsive and doesn't do things Stephenie can do for herself. She is not hovering or overprotective."

The counselor also alluded to the animosity that exists between the mother, the maternal grandmother and the father and his wife. The mother does not deny that such antagonisms exist and has agreed that both parties have to work on eliminating that problem.

The counselor criticized the mother for dwelling on rectifying the wrong which has been done her. The counselor found that, "[the mother] was unable to identify or articulate the adverse effects ... limited placement would have on Stephenie." If this was intended to be a finding of fact, it is clearly erroneous. The mother has repeatedly stated that she does not wish an abrupt transition from the father's home to hers. She told Dr. Broll that she knew she could have immediately enforced the mandate of the supreme court and obtained sole legal custody and primary physical placement of Stephenie. However, she testified that she did not believe that would be in Stephenie's best interests. The maternal grandmother testified to the same effect. The mother

agreed that she would not enforce the supreme court's mandate during the pendency of these proceedings. Repeatedly, the mother has made it clear that she expects that gradually Stephenie would begin to spend more and more time with her and eventually be returned to her home. She testified that she had seen the father's home and had no objection to it. Further, she felt that the McFarland school district was a good educational facility and she did not want to see Stephenie removed from the school. I find this attitude almost unheard of in custody and physical placement disputes. The usual situation is that the parents lose sight of their children's best interest and concentrate on hurting each other, even if that means hurting the children as well.

The record simply will not support a finding that the mother places her interests before those of her child.

(c) *Stephenie's interaction/interrelationship with her father.*

The counselor found that Stephenie is very attached to her father. The mother does not dispute this. The counselor reported that Dr. Broll opined that the father is caught between Stephenie's mother and his present wife. However, the counselor also points out that the father and his wife actively attempt to substitute Shauna for Wendy as Stephenie's mother. The father and his wife insist that Stephenie refer to her biological mother as "Mama Wendy" and Shauna as "Mom."

The father has resisted any increase in physical placement of Stephenie with the mother; he challenged the counselor's and guardian ad litem's recommendations for overnight placement; he insisted that any visitation be supervised; he resisted overnight placement on school nights; and he demanded that the mother not leave Stephenie alone with the maternal grandmother. He also conveyed subtle messages to Stephenie that "it might not be completely safe or comfortable at her mother's home." He told Stephenie that "Dad says it will take a long time till I stay overnight at Mama Wendy's. It

would be fun to sleep overnight there. Mama Wendy wants me to.... It's hard to get along [with] each other."

The counselor also reported that, in joint meetings, the father was very condescending to Wendy. He has associated virtually every problem Stephenie presents with her increased placement with her mother. He claims that Stephenie's behavior is more problematic after placement with her mother. However, Stephenie's teachers were unable to identify a pattern connecting Stephenie's behavior problems to the physical placement schedule.

> Andy is reluctant or unwilling to accept the possibility that any behavior problems Stephenie manifests on or near transition days may be a normal response to the parental battle, and the loyalty conflict Stephenie may experience as a result, since she probably does not feel encouraged by the members of each household to freely love those in the other.

According to the counselor, the father was quick to conclude that overnight placement on school nights would not work because the mother got Stephenie to school late the first time she had overnight placement on a school night. However, the teacher reported that Stephenie was three minutes late and was not marked tardy because it had snowed, the roads were in poor condition and Stephenie arrived before the school buses did. Furthermore, Wendy called the teacher and apologized for Stephenie's late arrival. The counselor concluded that:

> This history leads me to believe that [the father] will be unlikely to voluntarily agree to increased time with [the mother] when it may be warranted in the future. Therefore, while I feel it is necessary to Stephenie's best interests for her to be primarily placed with her father so that

> she can develop the skills she will need to acquire at each stage of her child development, I also believe that it is important for the Court to maximize the amount of placement that Stephenie can benefit from in her mother's home since [the father] will not be inclined to voluntarily increase [the mother's] placement in the future without court intervention.

(d) *Interference with parent-child relationship*.

The family court counselor did not make an explicit finding that the father is more likely to interfere with Stephenie's continuing relationship with her mother than the mother is likely to interfere with Stephenie's relationship with her father. However, she recited in great detail how Andy and his wife are attempting to substitute Shauna for Wendy as Stephenie's mother. The counselor found that "in his home, the father insisted that Stephenie perceive her stepmother as "Mom" and her mother as "Mama Wendy." Under the interaction factor, the counselor explained how the father has resisted every attempt to increase Stephenie's placement with her mother.

The mother allowed Stephenie to remain with the father when she could have enforced the supreme court's mandate and obtained sole legal custody and primary physical placement of Stephenie. No conclusion is possible from the evidence but that the father would be much more likely to interfere with Stephenie's relationship with her mother than would the mother interfere with Stephenie's development of her relationship with her father.

(e) *Stephenie's interaction/interrelationship with her stepmother*.

The counselor reported that Stephenie identifies the father's wife, Shauna, as her mother. That is practically a given in view of the six-and-one-

half years Stephenie has been wrongly placed in the father's home. Stephenie's identification of Shauna as her mother does not necessarily show that Shauna is an acceptable, or preferable, role model. Shauna is even more vehement than the father in insisting that Stephenie look to her as "Mom." The counselor reports that Shauna is quick to attribute any physical or emotional problem manifested by Stephenie to Wendy. When a teacher called Shauna to inform her that Stephenie had twisted her neck in a gym class, Shauna replied, "Guess where she was this weekend?" When Stephenie got her stomach caught in her zipper while she was at her mother's, Shauna pointed out the scratch on Stephenie's stomach three times to the day-care provider. She asked the day-care provider to write up an incident report for purposes of this litigation when Stephenie scratched another child the day after she returned from placement with her mother. She lobbied Dr. Serlin to make an adverse report on the mother. The counselor reports that Shauna said: "Someone's got to see this kid and see our point and get it to the Court." Dr. Broll reported as follows on sessions involving the three parents: "Shauna would often mutter under her breath about Wendy in front of Wendy.... Shauna is too controlling (about how to handle Stephenie). She leaves the room, slams the door and Wendy appropriately expresses concern about her modeling inappropriate behavior in front of Stephenie." The counselor also reported that when she and the guardian ad litem included Shauna in meetings, "[I]t was clear that Shauna must be in control. She so frequently interrupted Wendy to explain why her own version of events was accurate or how a particular situation should be handled, that we would have to intervene to permit Wendy the opportunity to speak." The guardian ad litem had to physically gesture to Shauna to be quiet.

(f) *Stephenie's adjustment to school*.

The family court counselor reported that Stephenie has significant speech, language and behavioral problems. She is likely to be diagnosed with Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD). She reported that Dr. Broll, Dr. Serlin and the teachers believe that it is probable that Stephenie has ADD.

In addition, Stephenie has behavioral problems at school: she calls other children names; kicks them; spits at them; punched another child in the stomach; screamed in a child's ear; and becomes easily annoyed with other children. One of her teachers opined that, "[e]motionally, Stephenie hasn't bonded appropriately with anyone and those with whom she's bonded, she fights like cats and dogs."

The counselor also reported that although each parent is quick to attribute these problems to the other parent, and to transitions between the homes, Stephenie's teachers do not establish a pattern associated with transition days despite the fact that they thoroughly documented incidents when they occurred.

The father and his wife expressed concern to the school superintendent because the mother had lunch with Stephenie approximately once a week. The family court counselor found that this "conduct" suggested that the mother "is focused on making up for `lost' placement time *at the expense of Stephenie's normal child development*. It also suggests that she has difficulty distinguishing her own needs from Stephenie's needs." (Emphasis added.) The counselor unfairly puts the mother in a "Catch-22" position: If she doesn't see Stephenie enough, she is neglectful; if she sees her too much, she is suffocating. In a time when the principal cause of juvenile delinquency is parental neglect, the suggestion that having school lunch once a week with one's child is detrimental to the child's development strongly suggests a conclusion-bias on the part of the evaluator. While in most respects the counselor's report is relatively even-handed, in this respect, I find the counselor's report unfair.

The counselor reports that "Wendy attended parent/teacher conferences *but did not call to discuss academic or behavioral concerns*." (Emphasis added.) If she had called to discuss these concerns but called too often, apparently she would be focusing on her own needs rather than Stephenie's.

I find it significant that the school officials did not complain or even discuss with the mother how frequently she should have lunch with Stephenie. Nor did the school officials complain that Wendy was not giving them advance notice of her intention to have lunch with Stephenie. The father apparently complained to the counselor and the guardian ad litem about the mother's "conduct," after which apparently the mother followed this rule. If there is anything to be learned from this triviality, it is that the father and his wife are anxious to limit the mother's contact with Stephenie. This incident shows that the father and his wife are obsessed with their need to write the mother out of Stephenie's life.

(g) *Stephenie's adjustment to home and community.*

The counselor reports that transitions between homes have been difficult but does not suggest that the tensions are either parent's fault.

(h) *Stephenie's physical health.*

The counselor states: "A review of Stephenie's health care suggests that while [the mother] seeks medical advice, she does not follow it, sometimes to Stephenie's substantial detriment." This finding is clearly erroneous and evidences that in this respect, the counselor relies too much on the arguments made to her by the father and not enough on the facts. "[E]xpert opinion must be evaluated in light of the expert's opportunity to come to a reasoned conclusion." WEYRICH AND KATZ, AMERICAN FAMILY LAW IN TRANSITION 525 (citing ***Seymour v. Seymour***, 433 A.2d 1005 (Conn. 1980)).

It is true that when Stephenie was an infant, she was hospitalized for vitamin D deficiency and seizures "reportedly due to the diet [the mother] provided her." In his deposition, Stephenie's pediatrician, Dr. Patrick D. Meyer, testified that Stephenie's problem in this regard resulted from a low serum

calcium level. He further testified that it was "very rare to find a low serum calcium in that age group, but we found it in Stephenie." He also testified that "I don't think it had anything [to] do with the diet." The father scoffs at the mother's feeding Stephenie goat's milk rather than whole milk. Dr. Meyer testified: "[Stephenie's] been on goat's milk for some time and she does well with [it] and regular milk she doesn't do well with." In the discharge from the hospital instructions Dr. Meyer gave Wendy, Dr. Meyer told her to "try to offer goat's milk every hour she's up."

The counselor also relied on a letter from Dr. Meyer to the guardian ad litem of June 22, 1993. In that letter, Dr. Meyer stated: "[Stephenie's] somewhat unusual diet did lead to a problem with low blood calcium and vitamin D levels, which resulted in some seizures and a hospitalization to sort this out." Plainly, Dr. Meyer was writing from recollection and not from his records. His deposition testimony was given almost five year's earlier and was based on his records. I suggest that it is more accurate to rely on his records as Stephenie's pediatrician than to rely on his apparently unaided recollection more than five years after Stephenie was removed from her mother's care and he no longer saw her.

In his letter, Dr. Meyer also stated:

> From a standpoint of Steph[e]nie's overall pediatric health, nutrition, growth, and development, I would be more comfortable with the father's approach to her care than the mother's.... I think that the mother is more likely to seek alternative, and what I would consider sometimes *suboptimal* care."

(Emphasis added.)

We may assume that Dr. Meyer was not referring to his care as "*suboptimal*." Yet, virtually the only medical care which the mother sought for Stephenie was his care or with doctors approved by him. The mother consulted Dr. Judd because Dr. Meyer was not a gastroenterologist. Dr. Meyer consulted with a specialist in allergies, Dr. Friedman of U.W.-Madison Hospital. Dr. Meyer's records show that Stephenie was under his care almost from the time of birth until she was removed from her mother's care. His assessment of Stephenie's health was that she was "thriving in the mother's care." Regrettably, Dr. Meyer appears to have been lobbied to express a medical opinion totally inconsistent with his contemporaneous record of his care of Stephenie and his observations of the mother's care.

The family court counselor and the guardian ad litem were entitled to rely on Dr. Meyer's letter. However, it must be conceded that Dr. Meyer wrongfully advised the guardian ad litem as to Stephenie's health.

The counselor reports that a social worker to whom the mother was referred expressed concern that "with all the medical forum shopping [the mother] had done, that this may be a `munchhausen in proxy.'" The essential feature of this "proxy" is the deliberate production of symptoms in another person who is under the individual's care.

The social worker had no medical qualifications to express such an opinion and is typical of result-oriented bias. That statement is also untrue, whether deliberate or not. It seems strange that Stephenie's pediatrician for almost twenty months did not identify this "proxy." The social worker does not document her concern that the mother had been "medical forum shopping." The mother went to Dr. Judd because Dr. Meyer admitted he had no expertise in that area. The mother did take Stephenie to a chiropractor to determine whether her rickets had affected her spine. The father regarded this as inappropriate because he didn't trust chiropractors. This is yet another example of the double standard to which the mother was subjected. It was alright for the

father to distrust chiropractors, but the mother's distrust of psychologists was an indication she would not seek "traditional" medical care. Further, the mother's rejection of Dr. Broll was not based on a general distrust of psychologists but her objection to the way Dr. Broll was working with Stephenie. The mother testified therapy was the first priority for Stephenie. She has not interfered with or objected to Dr. Serlin's therapy.

I must fault the family court counselor for selectively parsing Dr. Nagle's letter to the mother to support her conclusion that the mother would be less likely than the father to attend appropriately to Stephenie's medical problems. The counselor failed to include in her report to the court the last sentence of Dr. Nagle's letter, which is as follows: "It is apparent from review of [Stephenie's] records in detail that she has been provided excellent and appropriate care throughout the last many months."

On July 5, 1988, the issues of child support and visitation by the father with Stephenie were heard by the Rock County court. Dr. Meyer's deposition was introduced by the father as an exhibit. He deposed that as of June 15, 1988, he did not believe there was any medical reason why the father could not have visitation with Stephenie as long as he was aware of her medical problems and knew the diet she did best on. He deposed that Stephenie had intolerances to certain foods, but he did not believe visitation was a high risk to Stephenie's welfare as long as the caretaker was aware of what had occurred in the past (Stephenie's seizures) and would recognize a seizure that required attention.

On July 29, 1988, the Rock County family court commissioner entered a stipulated order providing for visitation of Andrew with Stephenie. However, visitation was subject to conditions as to Stephenie's dietary needs. On August 9, 1988, when the Rock County court granted sole legal custody and primary physical placement to the mother, the court said: "I recognize that there was a point when this child was having some medical problems.

However, I am satisfied, based on Dr. Meyer's testimony and conclusions, that that child is out of danger now and [the father] ought to be afforded reasonable visitation." However, the court ordered that the father comply with the dietary restrictions imposed by the mother.

The counselor detailed the controversy between the father and the mother over Stephenie's bowel problems. However, no one suggests that this problem is not being attended to and, in fact, Stephenie has had a problem in this respect virtually since birth. While in the mother's care, the problem was diarrhea probably resulting, according to Dr. Meyer, from the child's food intolerances. In any event, no one suggests that this is a serious health problem.

Any bowel problem Stephenie may now have may be the result of "separation trauma." "After separation from the familiar mother, young children are known to have breakdowns in toilet training...." J. GOLDSTEIN, ANNA FREUD, A.J. SOLAIT, BEYOND THE BEST INTERESTS OF THE CHILD 331.

(i) *Stephenie's mental health.*

The mental health professionals agree that Stephenie probably has ADD or ADHD. Dr. Serlin recommended medical evaluation and suggested that Stephenie "shouldn't have treatment less than weekly."

It is puzzling that Stephenie did not exhibit any behavioral or developmental problems while in the mother's care and that those problems surfaced shortly after Stephenie was removed from the mother's care. The father emphasizes that Stephenie's behavior seems to be worse when she returns from physical placement with the mother. However, Stephenie's teachers have not been able to identify any correlation between Stephenie's misbehavior and physical placement with her mother.

I find it vastly more puzzling that none of the professionals mention "separation trauma" as a possible cause of Stephenie's emotional problems. In our earlier opinion, we recognized this phenomenon as did the Supreme Court. *See* ***Stephanie R.N.***, 174 Wis.2d 745, 498 N.W.2d 235. In ***Adoption of Tachick***, 60 Wis.2d 540, 554-55, 210 N.W.2d 865, 872 (1973), the court said:

> The literature on the problem of separation trauma of a young child is vast and interesting.... [S]eparation during the early years of an infant's life from the mother figure causes apprehension, depression, withdrawal, and rejection of environment, slow movement, and stupor, anorexia, and weight loss, insomnia, eczema, and respiratory infections, and continued separation may bring on further withdrawal, persistent autoerotic activity, frozen rigidity, catatonia and cachexia.

"Where there are changes of parent figure or other hurtful interruptions, the child's vulnerability and the fragility of the relationship become evident. The child regresses along the whole line of [her] affections, skills, achievements, and sound adaptations." BEYOND THE BEST INTERESTS OF THE CHILD at 17-18.

The mother, of course, did not create the separation trauma. The Rock County court ordered that she have no unsupervised visitation with Stephenie until she had posted a $2,000 cash bond. Thus, for the first forty-five days after Stephenie was removed from her home, she had very little contact with her mother. Later, because neither the Rock County social service agency nor the Dane County social service agency would provide supervised physical placement, Stephenie did not see her mother for six months. It is difficult to accept that an allegedly loving father would forcibly separate his twenty-

month-old infant daughter from her principal caregiver solely to punish the mother. It is impossible to accept that it is in the best interest of a child to grant sole legal custody and primary physical placement to such a parent. He has done a complete *volte face*. I find it difficult to accept that the professionals were unbiased when they fail to even comment on the father's ignoring of the day caretaker's pleas to do something about Stephenie's behavior and his failure to seek medical advice to even diagnose Stephenie's behavioral problems.

The mother does not deny that Stephenie needs therapy. In fact, she testified that that would have to be the first priority even before Stephenie was returned to her home.

(j) *Character of parents*.

This factor is not specifically prescribed as a "best interest" factor under § 767.24(5), STATS., and was not addressed by the family court counselor, but in my opinion it is the most important consideration in determining which parent is the more likely to provide the child with appropriate values.

The father deliberately defamed the mother in his effort to gain the sympathy of the trial courts. In his affidavit in support of his order to show cause, the father alleged:

> 16. The Rock County Circuit Court found "substantial evidence" of child abuse; petitioner believes that a strong possibility exists that sexual abuse, excessive corporal punishment and other physical abuse occurred during the period Stephenie ... resided with [her mother] and during subsequent unsupervised visitation.

At oral argument before the supreme court, the father's attorney conceded that there was no evidence to support the Rock County trial court's finding. Yet, the father continues to rely on that finding. In these proceedings, none of the professionals have suggested that the mother subjected Stephenie to sexual or physical abuse. Surely Stephenie's pediatrician would have observed any abuse in the nineteen months Stephenie was in his care. The "evidence" the father would undoubtedly point to was evidence that Stephenie exhibited behavior consistent with such abuse. However, such behavior is also consistent with separation trauma. *See* ***Adoption of Tachick***, 60 Wis.2d at 554-55, 210 N.W.2d at 872. The National Council of Juvenile and Family Judges Reference Guide, CHILD DEVELOPMENT, states that: "It is reasonable to assume that a child under the age of three will retain a significant psychological attachment to his or her parent for as long as 12 months after separation ...." ***Id***. at 24.

It is illustrative of the double standard which has been applied to the mother in this case that Stephenie's behavior upon return from visiting her mother was attempted (unsuccessfully) to be linked to possible physical or sexual abuse rather than separation trauma.

The father's affidavit far exceeds the bounds of zealous advocacy and violated § 802.05(1)(a), STATS.[23] I join my colleagues in striking the father's

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[23] Section 802.05(1)(a), STATS., provides in part:

> Every pleading, motion or other paper of a party represented by an attorney shall ... be subscribed with the handwritten signature of at least one attorney of record in the individual's name.... The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact ... and that the pleading, motion or other paper is not used for any

affidavit but I would go further and strike his motion and award the mother her costs of litigation.

The father's affidavit is not the only indicator of his unfitness as a role model for Stephenie. First, he failed to support the child he now claims he loves so deeply. How will he explain his callous disregard to Stephenie when she reaches the age of understanding? He was willing to have sheriff's deputies break into Stephenie's home and remove her from her crib thus subjecting her to the separation trauma from which she is gradually recovering. How will he explain this reckless disregard for her mental health to Stephenie? He falsified his financial aid application for school year 1988-89. He was asked to list any unusual expenses, educational and other debts. He stated: "I have joint custody of my daughter [false] who lives in Janesville, WI. 17.5% of my gross income goes directly to her support [false]." The form requires a certification that: "All of the information on this form is true and complete to the best of my knowledge...." Finally, when Stephenie was placed in his care he made no effort for almost five months to treat her Attention Deficit Disorder.

(..continued)

> improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

See also ***Riley v. Isaacson***, 156 Wis.2d 249, 456 N.W.2d 619 (Ct. App. 1990) (this statute requires an affirmative duty of reasonable inquiry before filing).

The Rock County court's expert witness testified that from the father's letters to the mother, it appeared that he regarded her as a "top-notch" person. The trial court complimented the mother on the way she had conducted her part in the hearing. The mother's employer and fellow employees testified as to the mother's good character and her loving relationship with Stephenie.

STEPHENIE'S SPECIAL NEEDS

The critical finding of the family court counselor that there is a much greater likelihood that the father and stepmother "will continue to prioritize, and strive to meet, Stephenie's needs" is contradicted by the record. Plainly, the family court counselor was not aware that Stephenie's day caretaker terminated her contract with the father because he refused or failed to tend to Stephenie's emotional needs resulting from separation trauma. At the December 13, 1989 hearing, guardian ad litem Daniel introduced Exhibits 19a, 19b, 19c, with attachments consisting of excerpts from the day caretaker's records. On August 7, 1989, the day caretaker, Kristine Hanson, wrote the father as follows:

> This letter is to give you a written notice of care being discontinued on 18 August 1989 for Stephenie as per our contract agreement. I will try to help you in any way I can to find a suitable replacement during the next two weeks. Please let us know how you are all doing in the future.

To explain this letter, Hanson included the following in her records:

> Week before Stephenie's behavior became totally unmanageable and she was a physical threat to all the other children. I had encouraged Andy to find help for Stephenie through the above listed resources and he finally contacted a few of them last week but I feel it is too late and he should have contacted them back in April. Care will be discontinued for Stephenie on 18 August. I feel that a different placement will be more beneficial for Stephenie.

Hanson was a witness at the hearing before the Rock County Circuit Court. She testified that Exhibits 19a and 19b were identical. This is not true. In Exhibit 19b this sentence follows the above-quoted material: "Both Andy and Tod Daniel[] have been less than helpful in my requests concerning Stephenie." If this tragedy continues, the deletion or addition (it could be either) of this damning sentence should be explained.

Hanson considered the problem of Stephenie's behavior on April 11 when she wrote Andrew listing service sources he could consult. The resources Hanson suggested the father consult included information on how to discipline children and how to deal with a difficult child. Hanson also suggested that the father consult a staff person at another daycare center and projects operated by the city of Madison or Dane County. However, the father failed to address Stephenie's behavior problems for almost five months.

Exhibit 19c consists of excerpts from Hanson's medical log beginning March 22, 1989. On August 8, 1989, Hanson noted in her log that the father could have taken steps recommended by her in April to address Stephenie's behavioral problems. Her incident report of August 9, 1989, records that a city of Madison resource recommended by Hanson, Charmaine Drake, did not receive a call from the father as he had told Hanson.

On August 18, 1989, Lori Ziemann, Staff Consultant, Satellite Family Child Care, reported a Home Visit observation of Stephenie on August 18, 1989. In her discussion summary, Ziemann stated that, "Kristine was not able to continue care [of Stephenie] because of the lack of cooperation with the parent regarding seeking outside consultation and advi[c]e." She also expressed the hope that by Hanson terminating care, the father would be forced to seek more help and "that Stephenie will benefit from that."

On July 18, 1989, Hanson began to keep a personal notebook for each child. The purpose of the notebook was to communicate with the child's parents. On August 14, 1989, Hanson observed that Stephenie had seventeen temper tantrums; on August 15, 1989, twenty-two temper tantrums; on August 16, 1989, thirteen temper tantrums; on August 17, 1989, eighteen temper tantrums; and on August 18, 1989, eleven temper tantrums.

What I find most mystifying is that none of the professionals considered the effect upon Stephenie of the forcible separation from the mother to whom she had bonded and become attached. This phenomenon is especially puzzling in view of the vast amount of literature which has addressed the separation trauma. *See* ***Adoption of Tachick***, 60 Wis.2d at 553-55 & n.9, 310 N.W.2d at 872. In CHILD DEVELOPMENT, Drs. Russ and Stein explain that, "It is not uncommon for the child to have anxiety the day before the transition, during the transition and for a day after." ***Id***. at 26. Dr. Russ explains that a child under the age of three will retain a significant psychological attachment to his or her parent for as long as twelve months after separation. ***Id***.

The separation trauma must be exacerbated in any situation in which the child is separated from the mother-figure and placed with a virtual stranger, especially when she does not see the mother-figure for long periods. In a divorce, the usual case will be that the child has lived with his or her parents and has become attached to each of them. That is not the case in most

custody disputes between unmarried persons who have not lived together with the child, as is the case with Stephenie, except very briefly.

In view of the mother's completely unblemished record of providing for Stephenie's medical needs, and the father's failure to address a problem serious enough to actively concern the daycare worker, the counselor's preference for the father to attend to Stephenie's needs is clearly erroneous.

My colleagues treat the father's gross neglect of Stephenie's needs as water over the 1989 dam. In other words, "What hasn't he done for Stephenie lately?" What he hasn't done for her lately is to seek treatment for a very serious medical condition recognized by the mental health evaluators and Stephenie's teachers. It is undisputed that these people believe that Stephenie's behavioral problems may stem from her ADD. Yet, he has not sought to have that condition diagnosed or treated.

Dr. Beverly Bliss reported that the father had addressed Stephenie's developmental, emotional, and behavioral problems in the past. That finding is clearly erroneous in view of the father's failure to address Stephenie's ADD or ADHD problem. Dr. Bliss's apparent conclusion-bias makes her findings relatively useless. For example, she states: "When Stephenie is with her, [the mother] handles situations as she sees fit, even if this undoes programs or plans that [the father] has established." The only example she cites is the struggle between the mother and father over Stephenie's bowel functions. Somehow I do not find that kind of disagreement as undoing a program or plan that the father has established. Dr. Bliss needs more concrete examples to make credible her conclusion that the mother handles situations as she sees fit when Stephenie is with her. Further, the mother has a legal right and the responsibility to make routine daily decisions regarding the child's care during physical placement. *See* § 767.001(5), STATS.[24] There is no medical

[24] Section 767.001(5), STATS., provides:

evidence in the record as to the severity of Stephenie's bowel problem; nor is there any evidence that the mother was instructed by a doctor that her efforts to ease Stephenie's discomfort by using Vaseline was inappropriate care.

It is impossible to conclude from the mother's track-record that she has not been attentive to Stephenie's medical needs. While she disagreed with Dr. Broll's approach to therapy and reacted excessively, she has not interfered with Dr. Serlin's therapy. Further, she testified that therapy for Stephenie was the first priority. The suggestion that she will not attend to Stephenie's medical and emotional needs is not borne out by the record and is purely speculative. We and the Supreme Court have warned that speculative evidence is not appropriate to fulfill a statutory standard. *See, e.g.,* ***S.R.N.***, 167 Wis.2d at 336, 481 N.W.2d at 681. Dr. Bliss's "finding" that "[Stephenie] needs treatment but [the mother] will probably undercut therapy with [Dr. Serlin]" is unfounded.

In the child custody and physical placement area, family courts (and appellate courts) must rely on the reports of professionals. "The [family] court shall consider reports of appropriate professionals if admitted into evidence when legal custody or physical placement is contested." Section 767.24(5), STATS. Bliss's prediction that the mother "will probably undercut therapy with [Dr. Serlin]" did not prove true and it raises questions as to the impartiality of her evaluation. Appropriate professionals can and must make findings and recommendations, just as must a trial court. Again, just like a trial court, a professional must base his or her opinion upon facts, not conjecture. For example, where is the evidence that the mother "hates" therapy? This

(..continued)

> "Physical placement" means the condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody.

simply does not square with the mother's actions. She testified that Stephenie's first priority is therapy and she refused to enforce the mandate of the supreme court to return Stephenie to her, preferring a gradual approach in which therapy would be an integral part.

I find it particularly disturbing that although Dr. Serlin, the school officials and Dr. Bliss believe that it is "quite likely" that Stephenie has ADD or ADHD, they do not call for immediate diagnosis and treatment. Instead, they apparently are willing to leave it up to the father to see that Stephenie gets the needed medical treatment, even though he has not seen that need for more than six years.

Dr. Bliss found that Stephenie has disabilities more pervasive than a simple ADD. She suggests a DSM III R diagnosis. Attention Deficit Hyperactivity Disorder (ADHD) has become the official term for the clusters of symptoms which Stephenie exhibits. CHILD DEVELOPMENT at 64. The specific etiology of ADHD from a medical perspective remains unknown, but is presumed to be rooted in neurobiological mechanisms. ***Id***. However, Stephenie's "special needs" may be part of the separation trauma she experienced when she was uprooted from her home in the "attachment" years.

The DSM III R is a collection of diagnostic criteria for each mental disorder. Whatever its original cause, "clinically significant behavioral or psychological syndrome or pattern ... that is associated with present distress ... must currently be considered a manifestation of a behavioral, psychological, or biological disfunction in the person." ***Id***. at 41.

Stephenie's symptoms which were noted first upon separation from her mother-figure do not necessarily demand a DSM III R diagnosis. Her symptoms are very likely the result of her separation from her mother in the "attachment" years.

> Caring, consistency and time are the essential ingredients for the development of healthy emotional attachment and trust. These factors emerge as the environmental foundation of healthy growth. Consistency of environment, including people, places and rules, is necessary for the child to move through each stage of development successfully. Too many changes interfere with the child's ability to feel emotionally safe and to trust others. When deciding custody arrangements, it is essential, when possible, to keep children in the same location and close to the same adults for as long as possible. Constant disruptions intrude upon the child's ability to master the developmental tasks of life.
>
> In addition, most children of divorced families experience transitions from the home of one parent to another as one of the most difficult periods of adjustment. *It is not uncommon for the child to have anxiety the day before the transition, during the transition and for a day after.* This pattern is found among the young children and adolescent. Too many changes leave a child in a constant anxiety state.

Id. at 26 (emphasis added).

However, Stephenie's developmental deficits may have a neurobiological cause.

Dr. John Sikorski states that:

> Children meeting diagnostic criteria for ADHD show significantly more academic underachievement, have more speech and language problems, and more school failure as measured by repeating grades and school drop-out....
>
> Thus, comprehensive evaluation, differential diagnosis and comprehensive treatment planning [are] essential in order to make the correct diagnosis at the earliest time so as to begin effective treatment of the condition and minimize the downstream adverse consequences on their education attainments and psychosocial adaptation.

Id. at 66.

The "earliest possible time" has gone, thanks to the father's inattention. Stephenie must be diagnosed and treated as soon as possible.

ARMISTICE

As Drs. Russ and Stein point out, by the time a child is eight years old, he or she has some temporal recognition. This makes it possible to consider a different living arrangement; they suggest that the child live with each parent for a week at a time. This is an incentive where the parents are still angry and fighting. "[F]ewer exchanges of the children means less contact with the other parent and this is usually advantageous." ***Id***. at 27.

> The best plans try to incorporate the developmental needs of the children with the scheduling and emotional needs of the parents.... The plans that work the best are the

> ones in which the child's needs are central and the parents are willing to make it work with a minimum of anger and resentment. A custody plan that places the child's needs as central will be detrimental to the child if the parents continue to fight and use the child as an instrument of their anger.... It can take one to two years before the new families settle into a routine around children alternating between homes.

Id. at 27-28.

It was undoubtedly this phenomenon which caused the legislature to provide for the two-year "time-out" period after entry of the initial legal custody and physical placement order.

The father's failure to have treated Stephenie's serious health problem is especially regrettable because it is easily treatable. Drs. Russ and Donald E. Greydanus inform us that "about 75% of children and teenagers with an accurate diagnosis of attention deficit hyperactivity disorder will respond to available medications." CHILD DEVELOPMENT at 45. This disorder has become the official term for the clusters of symptoms or complaints which focus on the triad of inattention, impulsivity and hyperactivity to a degree which is considered "*developmentally inappropriate for an individual of a particular age*." ***Id***. at 64 (emphasis added). The first priority should be to determine whether Stephenie suffers from ADHD and then how to treat the disorder.

This case is no longer about Stephenie's best interests but who will win this lawsuit. Each parent has invested so much emotionally into this case that winning is everything. I suggest an approach where neither parent wins, or both parents win, but in either case, Stephenie wins: The parents should be awarded joint legal custody and equal physical placement.

Who shall make the major decisions in Stephenie's life does not seem to be a problem. That can be worked out through mediation, perhaps periodic, through the family court counseling service. The mother has testified that her goal is equal physical placement. Therefore, achieving these objectives appears to depend on the father.