

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 98-0953

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

BUCKLEY J. KAIN,

PETITIONER-RESPONDENT,

v.

SHELLY L. KAIN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County:
JOHN M. WIEBUSCH, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Shelly L. Kain appeals that part of a divorce judgment giving Buckley Kain primary physical placement of the couple's two daughters. She argues that the trial court erred by failing to apply § 767.325(1)(a), STATS., to a change of the commissioner's temporary placement order and that the

court erroneously exercised its discretion by failing to give sufficient weight to some factors that favored Shelly or suggested that Buckley would not make a good primary custodian of the children. We reject these arguments and affirm the judgment.

The divorce action was commenced in August 1994. By mutual agreement, Buckley was awarded primary physical placement of the children. After twenty-seven months with Buckley, a court commissioner transferred physical placement of the children to Shelly. In the divorce judgment six and one-half months later, the trial court returned custody to Buckley.

Section 767.325(1)(a), STATS., prevents a court from modifying a physical placement decision within two years of the initial order unless modification “is necessary because the current custodial conditions are physically or emotionally harmful to the best interests of the child.” That statute does not compel the trial court in the initial divorce decree to continue the physical placement ordered by a commissioner in a temporary custody order. Shelly’s interpretation of the statute would make the commissioner’s temporary order binding on the trial court in most cases. Because the family court commissioner does not have powers that supersede the authority of the circuit court to determine custody questions, we reject Shelly’s interpretation.

Citing *In re Paternity of S.R.N.*, 167 Wis.2d 315, 343, 481 N.W.2d 672, 684 (Ct. App. 1992), Shelly argues that § 767.325(1)(a), STATS., applies to a “temporary change of custody.” In *S.R.N.*, the trial court had already adjudicated paternity and placed the child with its mother. After the mother interfered with the father’s visitation rights, the court issued a “temporary order” transferring care, custody and control of the child to the father pending continuing investigation by

the guardian ad litem. *Id.* at 319-21, 481 N.W.2d at 674-75. Under those circumstances, this court concluded that § 767.325(1)(a), applied to the temporary change of custody pending a “full custody” hearing. *Id.* at 343, 481 N.W.2d at 684. *S.R.N.* did not involve an initial adjudication of primary placement in the circuit court and cannot be construed to require the circuit court continue a commissioner’s temporary placement order.

When reviewing the trial court’s decision, we give deference to its findings of fact. *See Pamperin v. Pamperin*, 112 Wis.2d 70, 75, 331 N.W.2d 648, 651 (1983). Upon a conflict in the testimony, the trial court is the arbiter of the witnesses’ credibility and the weight of the testimony, and when more than one reasonable inference can be drawn from the evidence, this court must accept the inference drawn by the trial court. *See Gardner v. Gardner*, 190 Wis.2d 216, 243, 527 N.W.2d 701, 710 (Ct. App. 1994). When the trial court has not made a specific finding on a matter in controversy, this court may assume that the matter was determined in favor of the trial court’s ultimate judgment. *See Sohns v. Jensen*, 11 Wis.2d 449, 453, 105 N.W.2d 818, 820 (1960).

The custody determination is committed to the trial court’s discretion and will be reversed only if the court failed to exercise discretion or if there is no reasonable basis for its decision. *Pamperin*, 112 Wis.2d at 75, 331 N.W.2d at 651. The court heard and accepted evidence that Buckley was a good father who actively participated in his daughters’ lives, maintained a reasonably clean house, had friends with children of comparable ages with whom the children played and utilized the assistance of his mother who lived nearby to perform necessary baby-sitting services. The court expressed appropriate concern that the children would have to go through a bedroom their mother shared with her boyfriend in order to use the bathroom at her residence. Shelly gave equivocal

answers regarding her willingness to change shifts at work to spend more time with the children. Her boyfriend, who had no training or other experience with child care, would be the children's custodian while Shelly was at work. The court reasonably concluded that the children's successful placement with their father since the separation should not be further interrupted.

Shelly argues that the court failed to give appropriate weight to evidence that Buckley had sent two pornographic letters and a nude photo to dating or singles services. Buckley denied writing the letters. Evidence regarding the circumstances of how the letters were written, by whom, and who took the photograph were confusing and contradictory at best. The trial court reasonably chose to give no weight to the letters.

Shelly argues that the court failed to give appropriate weight to Shelly's mother's observation of Buckley's "aggressive behavior" toward Shelly, other evidence that he would grab and touch women, and Shelly's sister's testimony that Buckley exposed himself to her and forced her to remove her shirt while he was giving her driving lessons. Buckley denied these allegations. The conduct described appears to be out of character from the personality described by other witnesses. The allegations first surfaced when the divorce proceedings were commenced. To the extent they demonstrate inappropriate conduct, they do not indicate any improper conduct toward Buckley's children. The trial court reasonably chose to give little weight to Shelly's attempts to characterize Buckley as a violent or abusive person.

Shelly argues that the court failed to give sufficient weight to the guardian ad litem's report that a surprise inspection of the home showed that it was unkempt, unclean and in need of much repair. That report was contradicted

by photographs depicting some repairs and observations by other nonparty witnesses who considered the home reasonably clean. Shelly also consented to Buckley's temporary custody of the children for over two years, knowing of the condition of the house. The trial court could reasonably find that Buckley generally kept the house reasonably clean.

By the Court.—Judgment affirmed.

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

