COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3129

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

IN RE THE MARRIAGE OF:

TAMARA R. DEVARES,

PETITIONER-RESPONDENT,

V.

BARNEY W. DEVARES,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge.

PER CURIAM. Barney DeVares appeals an order dismissing his motion for revision of his divorce judgment. He argues that the trial court erred when it determined that the custody and placement provisions in his divorce

judgment constituted a final order governed by § 767.325(1), STATS. He also argues that his motion does not request a substantial change in placement and therefore is governed by § 767.325(3), STATS. We reject his arguments and affirm the order.

Barney and Tamara DeVares were married in 1993 and had two sons. In 1996, the couple separated and during their separation, Barney was convicted of assaulting Tamara and was sentenced to fifteen years in prison. Barney had minimal contact with his children while in prison, and has not seen his sons, now ages seven and five, since 1997.

In July 1997, Barney and Tamara were divorced. Barney, who was incarcerated at the time, did not appear at the divorce hearing. Before the trial, Barney wrote the court a letter stating in pertinent part:

> *I contest this divorce for the following;*
> 1) *JOINT CUSTODY (Every other weekend/ Holidays, ½ the summer.*

The trial court observed that unless Barney was getting out of prison in the near future, it did not see how he could exercise his rights to physical placement because it would be inappropriate "to put these children in a position of being locked in a facility with a man who strangled their mother." It stated further:

> If this man is really serious he's going to have to make a motion and we're going to have to have a guardian ad litem appointed. He may have to pay fees for that up front and I think it is simply unreasonable for him to request those kinds of things at this point. I may reconsider and I'd certainly be willing to listen to his proposals on visitation, but don't think that this lady should have to bring the kids over there. If this man has a request for visitation, he's

> going to have to come up with a plan that will satisfy me in particular. So at this point … I'll award sole custody to the petitioner and I'm going to not grant any period of physical placement until such time as Mr. DeVares pays the fees for the guardian ad litem for the children and present some reasonable plan ….

The findings of fact stated: "The best interests of the children are served by awarding sole legal custody to the petitioner with period of physical placement as follows: no visitation until respondent files motion and pays fees." The conclusions of law and judgment stated: "The petitioner is awarded the legal custody of the following children: Damian Wayne DeVares [and] Jacob Allen DeVares with periods of physical placement awarded as follows: None Awarded." Barney did not appeal the divorce judgment.

In April 1998, Barney filed a motion to revise the divorce judgment seeking specific periods of physical placement. It alleged that a default divorce judgment was entered that conditioned Barney's rights to physical placement upon filing a motion and paying fees. The trial court appointed a guardian ad litem who filed a report with the court. The trial court later dismissed the Barney's motion, stating that Barney failed to "at least allege substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child." Barney appeals the dismissal of his motion.

Section 767.325, STATS., governs the revision of custody and physical placement provisions in a divorce judgment.[1] Under § 767.325(1),

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

> 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

(continued)

substantial modification of the initial legal custody order or physical placement order in the two years after its entry requires a showing that current custodial conditions are physically or emotionally harmful to the best interests of the child. ***In re S.R.N.,*** 167 Wis.2d 315, 332, 481 N.W.2d 672, 679 (Ct. App. 1992).

The legislature intended that there be a two-year period of finality after entry of an initial legal custody or physical placement order. "[T]he trend in Wisconsin and elsewhere [is] to make modification of custody and physical placement more difficult, especially in the period in which the children and parents must adjust to the new family situation." ***Id***. 167 Wis.2d at 331, 481 N.W.2d at 679. "The legislature requires the higher standard for modification of custody than for the original award of custody to promote the stability of the child's environment after the divorce, to encourage the private resolution of domestic disputes, and to minimize custody litigation after divorce." ***Herrell v. Herrell***, 144 Wis.2d 479, 487-88, 424 N.W.2d 403, 407 (1988). After the two-year period of finality, a court, under § 767.325(1)(b), STATS., may modify an

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> 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.
>
> 2. An order of physical placement if the modification would substantially alter the time a parent may spend with his or her child.
>
> ….
>
> (3) MODIFICATION OF OTHER PHYSICAL PLACEMENT ORDERS. Except as provided under subs. (1) and (2), upon petition, motion or order to show cause by a party, a court may modify an order of physical placement which does not substantially alter the amount of time a parent may spend with his or her child if the court finds that the modification is in the best interest of the child.

order of legal custody or substantially alter physical placement upon a less arduous showing.

Barney argues that the custody provisions in the divorce decree are not final and therefore § 767.325(1), STATS., should not be applied to require a showing that the modification is necessary because the current conditions are harmful to the child's best interest. He argues that the court's oral findings indicate that physical placement would be held open until a guardian ad litem would be appointed and an appropriate plan presented. He contends that the court's appointment of a guardian ad litem upon the filing of his motion to revise physical placement demonstrates that the initial ruling was not final. We disagree.

"The test of finality is not what later happened in the case but rather, whether the trial court contemplated the document to be a final judgment or order at the time it was entered." ***Fredrick v. City of Janesville***, 92 Wis.2d 685, 688, 285 N.W.2d 655, 657 (1979). "This must be established by looking at the document itself, not to subsequent events." ***Id***. The nature of the adjudication controls.

What constitutes a final judgment or order raises two inquiries:

> (1) whether it is final in the sense that as a matter of substantive law it disposes of the entire matter in litigation as to one or more of the parties; and (2) whether [it] is final in the sense that it is the last document in the litigation, that is, that the circuit court did not contemplate a document subsequent to the one from which the appeal was taken.

Radoff v. Red Owl Stores, 109 Wis.2d 490, 494, 326 N.W.2d 240, 241-42 (Ct. App. 1982).

Barney argues, in effect, that the trial court did not contemplate the divorce judgment to be the final document in the litigation. Barney misinterprets the divorce judgment. The judgment stated that no rights to physical placement were awarded. This determination disposed of the entire issue of physical placement, and was final with respect to that issue. The judgment recognized that Barney was entitled to file a motion in order to revise placement. However, the recognition that trial courts have continuing authority over custody and placement issues does not make the divorce judgment nonfinal.

Further, the court's subsequent appointment of a guardian ad litem in response to Barney's motion to revise the judgment does not indicate the judgment was nonfinal. Section 767.045, STATS., requires the court to appoint a guardian ad litem when the physical placement of a child is contested. Barney's motion contested physical placement and consequently the trial court properly appointed the guardian ad litem.[2] In any case, events subsequent to the entry of the order do not control its finality. *See* ***State v. Wright***, 143 Wis.2d 118, 123, 420 N.W.2d 395, 397 (1988).

Barney further argues that in light of the court's obligation to appoint a guardian ad litem at an initial custody and placement dispute, the court's failure to do so can only be interpreted as the trial court's recognition of the nonfinality of its decision. We disagree. The court's comments that if Barney was seriously contesting custody he was required to file a motion indicate that it did not regard Barney's letter as a motion to contest physical placement. Because it

[2] Barney did not directly appeal the divorce judgment itself and, as a result, does not argue that the initial physical placement ruling should be reversed on the ground that the court did not appoint a guardian ad litem at that time.

did not recognize a custody or placement dispute, the court did not appoint a guardian ad litem.

Next, Barney argues that his motion requesting periods of physical placement does not substantially alter the time he would spend with his children and as a result, should be governed by § 767.325(3), STATS.[3] We disagree. Currently, Barney has no periods of physical placement. His motion requested that he be awarded periods of physical placement. We conclude that the difference between no and some periods physical placement would be a substantial modification of the time he spent with the children.

By the Court.—Order affirmed.

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

[3] *See* note 1.