COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0572

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

SHERRI LANGE,

PETITIONER-APPELLANT,

V.

WILLIAM P.E. NELSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Sherri Lange appeals from an order denying her motion to modify her daughter's custody and physical placement schedule. She claims the trial court erred by: (1) barring her from having her daughter evaluated by a psychologist prior to the hearing; (2) refusing to recognize her daughter's

puberty as a substantial change in circumstances; and (3) determining her daughter's best interest without psychological testimony. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Lange and William Nelson were divorced in 1991. In 1993 a Dunn County court entered an order awarding Nelson sole custody and primary physical placement of their daughter, Kirsten. It deemed allegations of sexual abuse which Lange had made during that proceeding to have been "ruled out," and characterized the number of therapy sessions Kirsten had been required to attend as "outrageous."[1] The Dunn County court also expressed "grave concern" about Lange's attempts to break down Nelson's relationship with Kirsten.

¶3 In 1999 Lange moved to modify custody and placement based on Kirsten's approaching adolescence, her expressed desire to live with her mother, and complaints about her father which she had made to a school counselor. Specifically, during the 1997-98 school year, Kirsten told the school counselor that she was concerned because her father would sometimes come through the bathroom to get to the laundry room while she was showering and had come into her bedroom on one or more occasion when she was changing. The counselor reported the incidents to social services and spoke with the father about Kirsten's need for privacy as she got older. The counselor felt Nelson seemed to take the conversation seriously, and when he checked back with Kirsten a few weeks later, she indicated that it was not happening anymore.

[1] The court attributed the excessive number of sessions to the counselor, rather than to Lange.

¶4 During the 1998-99 school year Kirsten told the school counselor that she was uncomfortable with the way her dad would wrap his arms around her from behind when they were laying on the couch watching television. She told the investigating social worker and police officer that her father's arms touched her breasts during these contacts. She said that these "unwelcome hugs" had occurred on perhaps half a dozen occasions, and that she would have to struggle to get out of her father's embrace. Nelson freely admitted that he would not always let Kirsten go when she asked, but characterized it as horsing around in a long-standing game that would occur after she had sat down on him, pretending that he was a lumpy couch. He discontinued the behavior after discussing it with the counselor and social worker.

¶5 Nelson moved to prohibit any psychological examination of Kirsten as unnecessary and potentially harmful, given the determination by social services that the Nelson's conduct was non-assaultive and given the past battery of interviews and evaluations to which Kirsten had been subjected. The trial court granted the motion, and, after the hearing, determined that no substantial change in circumstances had occurred and that Lange had failed to overcome the presumption that continued primary placement with Nelson would be in Kirsten's best interest.

STANDARD OF REVIEW

¶6 The threshold inquiry for revising custody and placement decisions is whether there has been a "substantial change in circumstances." *See* WIS. STAT. § 767.325(1)(b)b (1997-98);[2] ***Licary v. Licary***, 168 Wis. 2d 686, 692, 484 N.W.2d

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

371 (Ct. App. 1992). We will not disturb the trial court's findings of fact about the circumstances that existed in the past and the present unless they are clearly erroneous. *See* ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 33, 577 N.W.2d 32 (Ct. App. 1998). We will also give weight to the trial court's legal conclusion about whether any change was "substantial," since that determination is intertwined with the facts. *See* ***Murray v. Murray***, 231 Wis. 2d 71, 77, 604 N.W.2d 912 (Ct. App. 1999). We will review the trial court's determination as to the child's best interest under the discretionary standard, upholding it so long as the trial court applied the proper legal standard to the facts of record to reach a reasonable result. *See* ***In re Paternity of Stephanie R.N. v. Wendy L.D.***, 174 Wis. 2d 745, 765-66, 498 N.W.2d 235 (1993).

ANALYSIS

¶7 Lange argues that she was entitled to have Kirsten examined by a mental health care professional because a child's mental health is always an issue in placement decisions under WIS. STAT. § 767.24(5)(e), and because she was alleging that her daughter was suffering emotional problems as the result of inappropriate conduct by Nelson. We are not persuaded, however, that the trial court's obligation to consider any relevant mental health issue translates into a requirement that psychological evaluations must be performed in every case.

¶8 Here, the trial court concluded that Lange's primary purpose in seeking a psychological evaluation was to bolster her theory that the conduct Kirsten had reported constituted abuse, notwithstanding the contrary determinations made by the investigating social worker and policewoman. There was no allegation that Kirsten was depressed or had any sort of mental illness.

The sole mental health issue was whether Kirsten had been emotionally damaged by inappropriate sexual conduct by her father.

¶9 We are satisfied that the trial court, acting as the trier of fact, would not need expert testimony to infer emotional or psychological damage to a child as the result of sexual abuse by a parent. *See* ***Hughes v. Hughes***, 223 Wis. 2d 111, 128, 588 N.W.2d 346 (Ct. App. 1998) (expert testimony is unnecessary for issues within the knowledge and experience of the average juror). Since the only alleged cause of psychological damage to Kirsten was the behavior which Kirsten had reported to the counselor, the only question the trial court needed to resolve in order to consider her mental health was whether the alleged conduct was or was not sexual in nature. Therefore, the trial court reasonably determined that a psychologist's testimony would be of limited help.

¶10 We are further satisfied that the trial court could properly take into account the past history of the case, including the number of therapy sessions Kirsten had previously attended as the result of prior unfounded accusations of sexual abuse. We do not view the guardian ad litem's suggestion to the court that further sessions could be harmful as an evidentiary offering, but rather as an argument in favor of an inference which could be fairly drawn from the state of the record. We therefore conclude the trial court did not commit reversible error when it precluded Lange from having her daughter examined by a psychologist or psychiatrist.[3]

[3] Furthermore, we question whether Lange has waived this issue by failing to make any offer of proof as to what type of expert testimony could have been offered based on the factual scenario of this case, and by failing to follow through on the trial court's offer to allow an evaluation by a social worker.

¶11 Lange next argues that the trial court should have found the combination of Kirsten's approaching adolescence, her discomfort with her father's conduct, and her expressed desire to live with her mother to constitute a substantial change of circumstances. We need not directly address this argument, however, because we are satisfied that, even if the facts before the court constituted a substantial change of circumstances, the trial court did not erroneously exercise it discretion in determining that Lange had failed to overcome the presumption that continued primary placement with Nelson would be in Kirsten's best interest.

¶12 After listening to all of the testimony, and paying particular attention to that of Kirsten, the trial court found that Nelson's conduct had been, at most, insensitive to Kirsten's increased need for privacy, but that it was not intentionally sexual, and had already been modified. The trial court noted that Kirsten was performing exceptionally well at school in her current placement, and that her relationship with other relatives, including a number of maternal relatives from whom Lange was estranged but with whom Nelson maintained contact, would likely be impaired if Kirsten went to live with her mother in Georgia. With regard to Kirsten's mental health, we are satisfied that the trial court could draw inferences based on indicators such as her demeanor in court, her moods (which were described as very steady), her social interactions with other children and her performance in school without expert testimony. [4] In sum, we see no misuse of discretion.

[4] Indeed, Lange's counsel later told the court during closing argument that there did not seem to be a dispute regarding the parties' or child's mental or physical health.

By the Court.—Order affirmed.

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