COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1570 **Cir. Ct. No. 01FA001988**

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

IN RE THE MARRIAGE OF:

TRACI L. ROBERTS,

JOINT-PETITIONER-RESPONDENT,

V.

MATTHEW A. ROBERTS,

JOINT-PETITIONER-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Matthew Roberts appeals an order granting Traci Roberts's motion to amend physical placement for their two children. The issues

concern the trial court's decision to disregard a physical placement stipulation and to substantially reduce physical placement with Matthew. We affirm

¶2 Traci and Matthew have two children aged twelve and eight. By stipulation, their February 2002 divorce judgment awarded Traci primary physical placement. Matthew's physical placement schedule provided for one weekend every two weeks during the school year, two nightly visits per week in Traci's home, and equally divided placement during school vacations. Except for the school vacation provision, the parties essentially kept the schedule that they adopted when they separated in 1996.

¶3 The parties more or less adhered to their schedule during the next one and one-half years, except that Matthew did not exercise his equal vacation placement in 2002. In May 2003 he remarried. During the summer of 2003 he received equal placement for at least part of the summer vacation.

¶4 The parties were in court for a child support hearing in September 2003. Both appeared for the hearing unrepresented by counsel. Just before the hearing commenced, Matthew proposed a revised placement schedule, giving each party equal placement throughout the year, on an alternating week basis. Traci signed the stipulation Matthew had prepared to that effect and the presiding family court commissioner (FCC) approved it at the child support hearing.

¶5 In November 2003, Traci moved the trial court to set aside the September stipulation, asserting that the alternative week placement was not working out and was harmful to the children.

¶6 In subsequent proceedings, Traci asked the trial court to set aside the September stipulation because of the circumstances under which she signed it and

the FCC approved it. Meanwhile, two years passed from the date of the divorce judgment, such that the restriction on modifying placements, set forth in WIS. STAT. § 767.325(1)(a) (2001-02),[1] no longer applied.

¶7 The trial court subsequently concluded that the proper standard to apply was the best interest of the child standard used for initial placement decisions. *See* WIS. STAT. § 767.24(5). Using that standard, the trial court ordered a placement schedule that closely followed the recommendation of a court-appointed psychological evaluator, Dr. Kenneth Waldron. The resulting schedule placed the children with Matthew every other weekend, with alternating two and three day weekends. Although the trial court made no formal ruling on Traci's motion to vacate the September stipulation, it is clear from the record that the trial court treated it as a nullity because of the hurried manner in which it was presented, signed and approved by the FCC, with no subsequent trial court review.

¶8 On appeal Matthew argues that: (1) the September 2003 stipulation is valid and enforceable; (2) the court should have decided the subsequent motion to modify under the WIS. STAT. § 767.325(1)(b) standard; (3) Traci did not prove a substantial change of circumstances since September 2003; and (4) she did not prove modification was in the children's best interest.

¶9 The September 2003 stipulation drastically revised the prior placement agreement, and Traci signed it hastily and without benefit of counsel. She testified that she did not understand its legal effect, and believed it to be revocable at will. There was no guardian ad litem or other advocate of the

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

children's interests involved, and no trial court review. Although the extent of their discontent was disputed, it was unrefuted that the children were unhappy with the alternating week schedule. "The best interests of the child are not always the primary concern of the parties and it is the child's welfare, not the parties' wishes, that are at stake…. Thus, the best interests of the child transcend the parties' stipulation." ***Racine Family Court Comm'r v. M.E.***, 165 Wis. 2d 530, 536, 478 N.W.2d 21 (Ct. App. 1991). Consequently, the trial court need not accept a physical placement stipulation and may make such modifications that the interests of the children require. ***Id.*** The trial court therefore had authority to disregard the September 2003 stipulation, and reasonably did so under the circumstances in which it was signed and entered.

¶10 However, we agree with Matthew that the trial court applied the wrong standard to subsequently modify the original placement schedule. Where, as here, the modification substantially alters a placement schedule, and more than two years have elapsed from the initial placement order, the court must not only find modification to be in the children's best interests, but also find a substantial change of circumstances since entry of the last order. WIS. STAT. § 767.325(1)(b). The trial court concluded that this provision did not apply because the initial order was entered by stipulation. The statute plainly does not recognize that distinction. Therefore, the trial court should have determined whether circumstances substantially changed since February 2002.

¶11 Notwithstanding the trial court's omission, we affirm the modified placement. Whether the facts present a substantial change of circumstances is a question of law. ***Keller v. Keller***, 2002 WI App 161, ¶7, 256 Wis. 2d 401, 647 N.W.2d 426. We may therefore determine the question de novo, even if the trial court did not address it. *See* ***Duhame v. Duhame***, 154 Wis. 2d 258, 262, 453

N.W.2d 149 (Ct. App. 1989). Here, the facts before the trial court included the following: (1) Matthew married in May 2003 and became the stepfather of three children; (2) one of those stepchildren exhibited behavior problems that created conflicts with Traci's and Matthew's children; (3) Matthew's new wife had a criminal record and exhibited a pattern of behavior that, in Dr. Waldron's opinion, created concerns about future problems between her and the children; (4) Matthew's new situation caused the formerly amicable relationship between Traci and Matthew to deteriorate; (5) both children articulated a clear preference for limited placement with Matthew; and (6) the twice weekly visits at Traci's home were no longer feasible. Those circumstances comprise a substantial change of circumstances under any reasonable view.

¶12 The trial court reasonably concluded that modification was in the children's best interests. A decision on placement based on the children's best interests is committed to the trial court's discretion. *See* ***Brezinski v. Barkholtz***, 71 Wis. 2d 317, 327-28, 237 N.W.2d 919 (1976). The trial court reasonably exercised that discretion based on the factors listed above that also comprise a change of circumstances. The resulting placement reasonably addresses those factors while maintaining Matthew's significant role in the children's lives.

¶13 Matthew also contends that the trial court erred by failing to order mediation of the placement dispute before modifying placement, and by ordering him not to administer non-prescription medication to the children during his placements. Both issues are waived. Matthew requested mediation in a written pleading, but never objected to the court's decision to proceed without it, despite numerous opportunities to do so. *See* ***Green v. Hahn***, 2004 WI App 214, ¶¶18-21, No. 03-3311 (concluding that party had waived mediation requirement by failing to request stay of proceedings in order to attempt mediation). He expressly

consented to the order on non-prescription medication. We do not review issues never presented to the trial court. *See* ***Gruber v. Village of North Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692.

By the Court.—Order affirmed.

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