

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 2009

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2008AP1921-FT

Cir. Ct. No. 2003FA894

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

ELISA M. ROSE, P/K/A ELISA M. GIBSON,

PETITIONER-APPELLANT,

v.

HERBERT M. GIBSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
DAVID T. FLANAGAN, III, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Elisa M. Rose appeals from the order dismissing her motion and supplemental motion to modify placement. Rose argues that her motion was sufficient to establish that there had been a change in circumstances

warranting modification of placement, that she was entitled to a hearing on the motion, and that the circuit court erred when it dismissed her motion. Rose argues that a change in circumstances occurred when her son's primary placement was changed from with his father in Wisconsin to with her in California. She further argues that because of that change, her daughter's primary placement should also be with her. We conclude that Rose has not established a substantial change in circumstances, which is a necessary predicate to modification of placement.

¶2 Rose and Herbert Gibson were divorced in 2004. They have two children: Ana and Adam. At the time of the divorce, Rose and Gibson agreed that Gibson would have primary placement of the children in Wisconsin. In 2006, Rose filed a motion to have the children's placement changed to with her in California. Rose and Gibson again reached an agreement that Adam would be placed with Rose in California on an interim basis. Rose also agreed to withdraw the motion regarding the change in placement for Ana without prejudice. The court entered an order pursuant to that stipulation.

¶3 In March 2008, Rose filed a motion to modify placement. She later amended this motion. Gibson and the guardian ad litem responded to the motion. Rose argued that there has been a substantial change in circumstances since the time of the divorce because Adam and Ana now live separately, and that Ana needed to be with her brother. The circuit court determined, however, that there had not been a change in circumstances since the time of the order entered in 2007 that provided for the interim placement of Adam with Rose in California. The circuit court stated:

There is something truly unfair about reaching an agreement permitting Adam to move primarily to California, and then returning to use that negotiated agreement, in full effect, as the factual basis to grab that

which was not obtained earlier. It was contemplated and agreed by [Rose] that what she obtained in that negotiation would separate Adam and Ana. That was not ideal, it was not what the Guardian and the Family Court Counseling Service recommended, but it was what both parties agreed to. It may, in some quarters, be perceived as a clever tactic but the issues here are far too important to resolve by cleverness.

The circuit court denied the motion without holding a hearing.

¶4 The circuit court has wide discretion in making physical placement decisions, and we sustain the exercise of discretion if the court made its determination based on the facts of record, demonstrated a logical rationale, and made no error of law. *Lofthus v. Lofthus*, 2004 WI App 65, ¶16, 270 Wis. 2d 515, 678 N.W.2d 393.

¶5 A party moving for a modification of physical placement under WIS. STAT. § 767.451(1)(b)1. (2007-08)¹ must show that modification is in the child's best interests and that there has been a substantial change in circumstances since the entry of the last order affecting physical placement. "A substantial change of circumstances requires that the facts on which the prior order was based differ from the present facts and the difference is sufficient to justify the circuit court's consideration of modification." *Abbas v. Palmersheim*, 2004 WI App 126, ¶9, 275 Wis. 2d 311, 685 N.W.2d 546 (citations omitted). "A substantial change of circumstances is one such that it would be unjust or inequitable to strictly hold either party to the original judgment." *Lofthus*, 270 Wis. 2d 515, ¶17.

Whether there is a substantial change in circumstances is a mixed question of law and fact. The circuit court's

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

findings of fact regarding an alleged change of circumstance since the last custody and placement order will not be disturbed unless clearly erroneous. However, whether a substantial change in circumstances has occurred is a question of law. Because the circuit court's legal determination is mixed with its factual findings, we give weight to the circuit court's decision.

Abbas, 275 Wis. 2d 311, ¶8.

¶6 In this case the circuit court gave two reasons for denying Rose's motion without holding a hearing. First, the court found that Rose had failed to follow a procedure established by the 2006 stipulation and order for resolving such a dispute. Second, the court concluded that Rose had improperly and unfairly attempted to use the agreement permitting Adam to move to California to "manufacture" a substantial change in circumstances. We agree with the circuit court on the second basis and conclude this is an independently sufficient basis to affirm the decision. Consequently, we do not address whether Rose violated the procedure established by the stipulation.

¶7 Giving deference to the circuit court's decision, and under the circumstances of this case, we conclude that Rose has not established that "the facts on which the prior order was based differ from the present facts and the difference is sufficient to justify the circuit court's consideration of the modification a substantial change in circumstances." At the time of the divorce Rose agreed that both children would have primary placement with their father in Wisconsin. In 2006, she moved to have the placement of both children changed to be with her in California. She and Gibson then entered into a stipulation that Adam's placement would be with her, and Rose withdrew her request as to Ana.

¶8 In 2008, Rose again moved to change Ana's primary placement on the basis that Adam's change in placement, which occurred pursuant to the

stipulation, was a substantial change in circumstances. In support of that claim, Rose argued that Adam and Ana missed each other and that, given Adam's age, there was only a short amount of time for the two of them to be able to live together. Rose certainly knew at the time she entered into the stipulation that Adam was not going to remain living with either of his parents for an indefinite period of time. Further, it is not unexpected that Ana, who had lived with Adam her entire life, might miss her brother when separated from him.

¶9 In essence then, the change in circumstances on which Rose relies is the change in Adam's primary physical placement—the very change she sought and obtained an agreement to bring about just one year prior to filing this motion.² The standard of a substantial change in circumstances is intended to establish a significant showing before the court is required to consider whether the best interests of the child warrant a change in placement. The standard is undermined if a party can meet it as Rose is attempting to do here.

¶10 Rose argues that the court must look at the change in circumstances from the time of the divorce, and not from the time of the 2007 order. We conclude, however, that it does not matter whether we view the change from the time of the divorce or the time of the change in placement stipulation. The fact remains that the change in circumstances Rose relies on occurred as the result of her seeking and obtaining an agreement to that change.

² We note the circuit court did not view the record as showing that changes in Ana's behavior or her emotional adjustment, in themselves constituted a substantial change in circumstances, and we agree with this conclusion.

¶11 Gibson asserts that the issue of whether Adam's placement should remain with Rose has yet to be decided. Nothing in this opinion should preclude the parties from seeking a resolution of any outstanding issues. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

