

In re the Marriage of:

Tabitha Clark-Robinson,

Petitioner,

Case No. 2003FA009124

and,

Rodney Robinson,

Respondent.

Memorandum of Law

Introduction

The parties to this action were divorced on June 7, 2004. The parties have four minor children. Initially, primary placement was awarded to the petitioner, Clark-Robinson. The placement order that is currently in effect was entered on May 9, 2007. That order provides that Clark-Robinson shall have primary placement and that the respondent, Robinson, shall have periods of placement every other weekend.

On April 8, 2008, Robinson filed a motion to modify placement and child support. The motion, which was filed by Robinson *pro se*, generally alleged that in the past year he had married, had obtained his own residence with his wife, and that he desired to play a greater role in the parenting of his children.

That motion was heard before the court commissioner on May 14, 2008. Commissioner Honrath found that, based on the statements made at the hearing, that there was no material change in circumstances to warrant a modification of the current placement order.

Robinson timely filed a motion for *de novo* hearing on his motion to modify placement. At about that time Robinson retained counsel to represent him. The case

was called for hearing on October 8, 2008. At this hearing the court permitted Robinson to augment the allegations of his motion with testimony. Robinson testified in greater detail concerning the fact that, since the last placement order, he has married and, therefore, if he were granted greater periods of placement his wife would be available to assist him in caring for the children. Robinson alleged that his marriage has made his personal life more stable and has prompted him to desire to play a greater role in parenting his children. Additionally, Robinson described for the court his new residence. During periods of placement each of the children would have his or her own bed and the boys would not sleep in the same room with the girl.

As will be set forth in more detail below, the procedural status of Robinson's motion is, in effect, a motion challenging the sufficiency of the factual allegations. In determining such a motion the court must take the allegations as true and then make the legal determination of whether those facts meet the legal standards. Here, in order to be entitled to a modification of the placement order Robinson must establish that there has been a substantial change in circumstances since the last placement order that makes it in the best interests of the children to modify the placement order. Robinson's motion alleges that since the time of the last order his personal life has become more stable, his children have grown older and they have expressed a desire to spend more time with him. Taken together these allegations amount to a change of circumstances sufficient to permit the court to modify the placement order.

Argument

I. Robinson's motion alleges sufficient facts which, if true, would constitute a material change of circumstances and, therefore, the court must order a hearing on the motion to modify placement.

lark-Robinson, in effect, moved to dismiss Robinson's motion for the reason that it fails to state a claim upon which relief may be granted. A motion to dismiss for failure to state a claim tests whether the complaint is legally sufficient to state a claim for which relief may be granted. *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997). In examining the legal sufficiency of the complaint, the court must

assume that the facts alleged are true, *id.*, and the court is concerned only with the legal sufficiency of the complaint. *Lane v. Sharp Pkg. Sys., Inc.*, 2001 WI App 250, P15, 248 Wis. 2d 380, 635 N.W.2d 896. Thus, a motion such as this may be dismissed only if it appears to a certainty that no relief can be granted under any set of facts that the movant could prove in support of the allegations. *Quesenberry v. Milwaukee County*, 106 Wis. 2d 685, 690, 317 N.W.2d 468 (1982).

Sec. 767.451(1)(b)1.a, Stats., permits the court to modify a placement order (where the motion is made more than two years after the entry of the original judgment) where it is shown that:

a. The modification is in the best interest of the child.

b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

2. With respect to subd. 1., there is a rebuttable presumption that:

a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.

b. Continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

3. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under subd. 1.

In deciding a motion to modify placement, the court must make findings of the circumstances that existed at the time of the prior order, the circumstances that exist at present, and whether, when compared, there are changes. *Lofthus v. Lofthus*, 2004 WI App 65, P17, 270 Wis. 2d 515, 678 N.W.2d 393. The courts have described a "substantial change of circumstances" in the context of Sec., 767.325(1)(b), Stats., (now Sec. 767.451(1)(b), Stats) as occurring when "the facts on which the prior order was based differ from the present facts, and the difference is enough to justify the

court's considering whether to modify the order." *Keller v. Keller*, 256 Wis. 2d 401, 647 N.W.2d 426 (2002). Whether there has been a substantial change in circumstances is a question of law. *Greene v. Hahn*, 277 Wis. 2d 473, 689 N.W.2d 657 (2004)

A. Change in circumstances

Here, Robinson alleges that his marriage is a change in circumstances. Although the statute, itself, provides that a change in marital status is not, in itself, enough to constitute a change of circumstances this certainly does not mean that Robinson's change of marital status is irrelevant. At the time the last order was made Robinson's life was unstable. He was living in his mother's home and exercising his periods of placement there. Robinson's marriage has provided a substantial increase in stability. Firstly, Robinson can now afford a more spacious residence that provides adequate sleeping arrangement that did not exist at the time of the last order. Moreover, Robinson's wife can provide additional supervision for the children.

Additionally, Robinson testified that his children have grown older and have expressed a desire to spend more time with him. With respect to age, a child's growing older does not, in and of itself, create a substantial change of circumstances," see *Greene*, 277 Wis. 2d at 473. However, *Green* permits the court to consider age as it related to changes in the children's needs, interests, and wishes. This, in combination with Robinson's change in marital status certainly creates a substantial change in circumstances since the time the last order was entered.

B. Children's best interest

The statute also requires that, if there has been a change in circumstances, that the modification also be in the children's best interest. The decision whether to modify a placement order involves the consideration and weighing factors to determine what is in the child's best interest and is committed to the circuit court's discretion. *Greene*, 277 Wis. 2d 473.

The law provides little guidance on this point except to make clear that this determination is left to the court's discretion. In general, Chapter 767 provides that it is

in the children's best interest to spend as much time with each parent as possible. This does not create a presumption that shared placement is appropriate in every case; however, here, Robinson and his children have expressed a mutual desire to spend more time together. Certainly it is in the children's best interest to develop a meaningful relationship with their father.

Conclusion

For these reasons it is respectfully requested that the court find that Robinson's motion alleges sufficient facts to require the appointment of a guardian ad litem and a hearing.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2008:

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