COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 8, 1997

No. 96-3009-FT

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

IN RE THE MARRIAGE OF:

LAURIE RUTH ROSIN, f/k/a
LAURIE RUTH JEWELL SCHOLTUS,

Petitioner-Appellant,

v.

LEE ALAN SCHOLTUS,

Respondent-Respondent.

APPEAL from an order of the circuit court for Douglas County: JOSEPH A. MCDONALD, Judge. *Cause remanded with directions.*

Before LaRocque, Myse and Madden, JJ.

LaROCQUE, J. Laurie Ruth Rosin appeals an order granting her former husband, Lee Scholtus, substantial periods of physical placement of the parties' six-year-old son.[1] The order arising out of Lee's motion to hold Laurie

[1] This is an expedited appeal under RULE 809.17, STATS.

in contempt, grants Lee nine consecutive nights and ten days of physical placement each month of the school year. Laurie contends that the court was required to appoint a guardian ad litem pursuant to § 767.045, STATS. This statute provides:

> Guardian ad litem for minor children
>
> (1) Appointment. (a) the court shall appoint a guardian ad litem for a minor child in any action affecting the family if any of the following conditions exist:
>
> 1. The court has special concern as to the welfare of a minor child.
>
> 2. The legal custody or physical placement of the child is contested.
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> Section 767.001(5), STATS., defines physical placement:
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> "Physical placement" means the condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody.

Lee contends that because his motion did not seek to modify the divorce judgment, but only sought an interpretation or clarification of "reasonable visitation," the statute has no application. Because the court awarded substantial physical placement, and because the boy's psychologist's report demonstrates a need for special concern for the minor child's best interests, we conclude that the boy should be represented by a guardian ad litem. Although the court inquired at the outset of the hearing whether the proceeding would go forth without a guardian ad litem, and Laurie's counsel did not respond, Lee concedes that under some circumstances the court must appoint a guardian ad litem sua sponte. *See* ***de Montigny v. de Montigny***, 70 Wis.2d 131, 137, 233 N.W.2d 463, 467 (1975).

Our decision does not mandate a new evidentiary hearing. The matter is remanded for the appointment of a guardian ad litem who may advise the court whether there is objection to the physical placement provisions of the order. Absent a request to present further evidence or argument, the order may stand without further proceedings. Finally, we reject Laurie's contention that the court erroneously exercised its discretion by failing to apply the statutory factors relevant to visitation. We therefore remand for further proceedings consistent with our opinion.

The parties were married in 1984, a son was born in 1990 and the parties divorced in Douglas County in June 1991. A stipulation incorporated into the divorce judgment provided that both parties were fit and proper persons for custody, but legal custody was awarded to Laurie. Lee was to have "reasonable visitation" upon twenty-four hours' notice.

Laurie remarried in July 1994 and moved to Brookfield, Wisconsin, where her new husband resided. Lee was denied visitation for a month after the move to Brookfield until Laurie was "settled in" her new home. For the following ten months, visitation was not a problem but, in July 1995, Laurie refused visitation because her family was moving from Brookfield to Milwaukee. The following month of August 1995, Laurie again denied Lee visitation with the child, who needed time to prepare for the start of school. Then, in September 1995, Laurie denied Lee visitation, asserting the child needed time to adjust to school.

Laurie wrote to Lee outlining several conditions necessary to the exercise of visitation:

1. You must bring a family member with you each time you come to my home to visit. Sister Davida would be a good, and convenient, choice. If you come by yourself, you will not be allowed in the house.

2. Visits will take place once per month in my home at my convenience, since I will have to stay home all weekend. If we cannot find a mutually agreeable time in a given month, no visit will take place that month.

3. Visits will last no longer than 5 hours on Saturday and 5 hours on Sunday.

4. No toys or other gifts will be brought in the house unless I have approved them prior to the time you come to the door.

5. You will need to prove to me after 12 months that you have been in therapy to learn to control your anger and verbally abusive behavior, and have taken a parenting course for me to consider relaxation of these guidelines.

Laurie testified that Lee complied both prior to and for a year following the divorce to her demands for supervised visitation imposed because Lee had made numerous threats toward her. She also described various objections to activities that Lee engaged in with the child she claimed were unsafe.

Lee's motion for remedial contempt sought as a condition to purge the contempt that Laurie permit visitation without obstruction or, alternatively, that a remedial sanction as provided by statute, § 785.045, STATS. At the outset of the hearing, the court inquired whether the parties were proceeding without a guardian ad litem. Lee's counsel responded that none was necessary because there was no request for a change in legal or physical custody. Laurie's counsel had no response to the court's inquiry.

An order of remedial contempt was issued in September 1996. The court criticized Laurie's escalating visitation restrictions and attitude toward Lee's parental rights. The court found that Laurie's visitation guidelines were contrary to the exercise of reasonable visitation by the child's father, and were contemptuous. There is no challenge on appeal to the court's contempt finding.

The court indicated that because the parties could not agree on reasonable visitation, the court would award "periods of physical placement." Pursuant to the order, Lee picks up his son from school on the second Friday of

each month during the school year, exercising nine consecutive overnights and ten days of physical placement, in the city of the child's residence. The court also awarded divided time between the parents at Christmas and spring school break. Each party was given telephone contact three times weekly, and Lee was given access to the child's school, medical, dental and psychological records. The court made rules and suggestions relating to gifts, finding that the father could have been trying to buy the child's favor. The court denied a request for Lee's visitation for one-half the summer vacation, pending further advice from a psychologist who had been working with the family.

We do not fault the trial court for proceeding without a guardian ad litem. The court inquired of the parties, and neither side suggested it was necessary. Nevertheless, as the evidence unfolded, while Lee's counsel advised the court prior to the hearing that "physical custody" was not in dispute, in fact physical placement was in dispute. Of equal importance is the evidence presented at the hearing, and relied upon by the court in making its placement decision, demonstrating a serious concern for the boy's welfare. The court made reference to the letter of a psychologist, Michael Mandli. It is apparent the boy has had significant problems adjusting to his family situation, and that adjustment is exacerbated by his parents' behavior toward each other. We cannot say with confidence that either party, under these circumstances, could fairly represent the child's best interests in resolving a longstanding dispute over visitation and placement.

We recognize that the challenged order is a remedial contempt order and not a modification of the divorce judgment. Nevertheless, under the unique consequences of the remedy provided, the result is, in fact, a substantial change in what the parties contemplated in their stipulated judgment. It is also arguable that because the child must remain in the city of his residence, Lee does not have "physical custody." Again, however, in light of the significant and continuous overnight visitation awarded, and in view of the boy's egregious problems, we believe a guardian ad litem should represent the child. This requirement is only a slight impediment to the court's broad contempt powers made necessary by the unusual nature of the remedy provided in this case.

Apart from the absence of a guardian ad litem, we summarily reject Laurie's contention that the court did not consider the proper factors in awarding expanded visitation. These decisions rest peculiarly with the trial

court's discretion. *See* ***Biel v. Biel***, 114 Wis.2d 191, 194, 336 N.W.2d 404, 406 (Ct. App. 1983). The record reflects the court's consideration of the factors set forth in § 767.24(5), STATS. We therefore reverse the order entered without the participation of a guardian ad litem, and remand for appointment of such a person who may advise the court whether he or she desires to present further evidence or argument on behalf of the minor child.

By the Court.—Order remanded with directions.

Not recommended for publication in the official reports.