**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 27, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP1783** **Cir. Ct. No. 2002PA27**

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

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**IN RE THE PATERNITY OF TRISTAN D. S.:**

**MARTIN C. H.,**

**PETITIONER-RESPONDENT,**

**V.**

**JILL E. S.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK, III, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Jill E. S. appeals an order of the trial court which gave Martin C. H. unsupervised placement with their child Tristan D. S. Jill contends

that the trial court: (1) impermissibly shifted the burden of proof to her so that she had to demonstrate Martin presented a continuing danger to Tristan; (2) order included an impermissible contingency; (3) relied on hearsay in its decision; (4) erred when it refused to stay the order pending this appeal; and (5) erred by refusing to order Martin to pay Jill's attorney fees and costs.

¶2 We affirm and hold respectively: (1) the court properly applied the burden consistent with Wisconsin law; (2) the order did not contain an impermissible contingency; (3) the hearsay at issue was never admitted into evidence; (4) the trial court properly refused to grant the stay; and (5) the trial court properly exercised its discretion when it refused to award attorney fees and costs to Jill.

## Background

¶3 Martin and Jill are the parents of their child, Tristan. When Tristan was approximately one and one-half years old, Martin and Jill attempted to live together with Tristan. Jill stated that after she observed Martin sexually abusing Tristan, she left the residence, taking Tristan with her. She reported the abuse, and county investigations began.

¶4 Child protection did not find enough evidence to sustain the abuse allegations. Martin, who denied the abuse allegations, was ordered to pay child support. He also sought visitation with Tristan, which Jill resisted. A family court commissioner ultimately held that Jill failed to meet her burden of proof that Martin was endangering Tristan. The commissioner recommended an order that would have allowed Martin unsupervised visitation with Tristan.

¶5 Jill asked for de novo review in circuit court. Following a trial, the court's final order was entered on December 15, 2004, and it gave Martin unsupervised placement.

## Discussion

*A. Allocation of the Burden of Proof*

¶6 Jill argues that the trial court improperly shifted the burden of proof to her at the hearing when it considered her motion to stay the unsupervised placement awarded to Martin. The trial court's final order continued Martin's supervised placement with Tristan until June 1, 2005. After June 1, Martin would have unsupervised placement unless the court determined that unsupervised placement would be physically or emotionally harmful to Tristan's best interests. Jill filed a subsequent motion with the circuit court seeking a stay of the order granting the unsupervised placement. The court denied the motion, stating that the evidence presented did not support a finding that unsupervised placement would be physically or emotionally harmful to Tristan.

¶7 WISCONSIN STAT. § 767.325[1] provides, in pertinent part:

> Except for matters under s. 767.327 or 767.329, the following provisions are applicable to modifications of legal custody and physical placement orders:
>
> **(1)** SUBSTANTIAL MODIFICATIONS. (a) *Within 2 years after initial order.* Except as provided under sub. (2), a court may not modify any of the following orders before 2 years after the initial order is entered under s. 767.24, unless a party seeking the modification, upon petition, motion, or order to show cause by substantial evidence that

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child:
>
> 1. An order of legal custody.
>
> 2. An order of physical placement if the modification would substantially alter the time a parent may spend with his or her child.

In paternity cases, the trial court "shall make such provisions as it deems just and reasonable concerning the legal custody and physical placement of any minor child of the parties." WIS. STAT. § 767.24(1).

¶8 Because Jill's motion sought a "substantial modification" of the placement order under WIS. STAT. § 767.325, the judge properly placed the burden on her. If Jill's stay had been granted, Martin would have continued with supervised placement through June 1, 2005, rather than unsupervised placement. Certainly this is a substantial modification of the placement order. After weighing the evidence presented, the trial court denied the motion stating,

> the issue is whether or not the evidence was such that would show that unsupervised contact would be harmful physically or emotionally harmful to Tristan. In my opinion, there was no testimony or evidence that convinced me that it would be harmful to have unsupervised contact between [Martin] and Tristan.

Thus, the court properly placed the burden on Jill to show cause by substantial evidence that the stay was necessary, and she failed to meet that burden.

*B. Contingency in the Order*

¶9 Jill also contends that the court erred because it included a contingency for Tristan's unsupervised placement in its final order. Jill argues the final order included a contingency that Martin undergo both a polygraph and

plethysmograph test. Jill also states that unsupervised placement was contingent upon the court determining that such placement was not physically or emotionally harmful to Tristan.

¶10 Jill relies on ***Koeller v. Koeller***, 195 Wis. 2d 660, 662-63, 536 N.W.2d 216 (Ct. App. 1995), where

> the trial court found that because [the children's mother and custodian] was suffering from terminal cancer, it was "necessary for the best interest of the children to make provisions for their custody and physical placement in case their Mother … dies or becomes incapacitated so as to eliminate uncertainty as to what will happen if that occurs."

Thus, the trial court ordered that if the mother died or became incapacitated, custody of the children would be transferred to the mother's sister. We held that "although the trial court has a broad discretion with respect to custody determinations, which will be given great weight on review, courts have no power in awarding custody of minor children other than that provided by statute." ***Id.*** at 664 (citation omitted). Because no "relevant statute or case states, or even suggests, that a change in custody may be ordered contingent upon the occurrence of some anticipated event or premised upon a prospective finding that someday a parent will be unable to meet his or her parental responsibilities," we reversed the order due to the improper contingency. ***Id.*** at 665.

¶11 Jill's reliance on ***Koeller*** is misplaced. First, no contingency, such as the kind existing in ***Koeller***, was created. The final order stated simply that "[Martin] shall undergo a polygraph exam and plethysmograph test." It did not state that unsupervised placement was contingent upon Martin passing the tests. Further, stating that unsupervised placement would commence unless the placement was physically and emotionally injurious to Tristan was a statement of

the clearly observable. For all intents and purposes, the court was simply restating the WIS. STAT. § 767.325 requirements. In other words, the court's placement order could be altered if there was "substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child." WIS. STAT. § 767.325. For the preceding reasons, the trial court did not create an improper contingency.

*C. Admission of Hearsay*

¶12 Jill argues that the trial court erred by admitting hearsay evidence supporting the assertion that Martin was not a danger to Tristan's welfare. Specifically, Jill argues that letters from Martin's treating psychologist and psychiatrist presented at trial on Martin's behalf were impermissible hearsay.

¶13 Generally hearsay cannot be admitted as evidence. WIS. STAT. § 908.02; ***State v. Williams***, 2002 WI 58, ¶19, 253 Wis. 2d 99, 644 N.W.2d 919. "A circuit court has broad discretion in determining the relevance and admissibility of proffered evidence." ***State v. Brecht***, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988). The court's discretionary decision will be upheld if it is made "according to accepted legal standards and in accordance with the facts of record." ***State v. Fishnick***, 127 Wis. 2d 247, 257, 378 N.W.2d 272 (1985).

¶14 We reject Jill's argument because the court never admitted the letters into evidence, and the opinions of both the psychologist and psychiatrist were clear from properly admitted evidence. First and foremost, the court specifically noted in its oral decision that the letters at issue were offered into evidence, but not admitted into evidence. Second, both the psychologist and the psychiatrist provided prior testimony and reports which were admitted into evidence upon

which the court could properly rely. Thus, the court did not improperly rely on hearsay evidence.

*D. Stay of the Order Pending Appeal*

¶15 Without citation to legal authority, Jill argues the trial court erred when it rejected her motion to stay the unsupervised visitation pending this appeal. The trial court's decision to grant or deny a stay pending an appeal is reviewed under an erroneous exercise of discretion standard. ***State v. Gudenschwager***, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1985).

¶16 WISCONSIN STAT. § 808.07(1) states that an appeal does not automatically stay the enforcement of a judgment. However, a trial court may stay the execution or enforcement of a judgment or order pending an appeal. WIS. STAT. § 808.07(2). The factors to determine whether a stay should be granted pending appeal are set forth in ***Leggett v. Leggett***, 134 Wis. 2d 384, 385, 396 N.W.2d 787 (Ct. App. 1986), and include the following:

> (1) a strong showing that [the moving party] is likely to succeed on the merits of the appeal;
>
> (2) a showing that, unless a stay is granted, [the moving party] will suffer irreparable injury;
>
> (3) a showing that no substantial harm will come to other interested parties; and
>
> (4) a showing that a stay will do no harm to the public interest.

¶17 Because Jill has not demonstrated that a stay should have been granted pursuant to ***Leggett***, we conclude the trial court did not erroneously exercise its discretion. Jill failed to address the ***Leggett*** factors in her appeal or to the trial court. The trial court concluded, "Viewing all of these factors

collectively, as is required, based on the failure of [Jill] to address the required factors, Jill has not met the burden required for a stay to be issued ….” Thus, Jill has failed to demonstrate that stay should have been granted. We also note that appealing the denial of a stay pending an appeal, in the pending appeal, renders the outcome of the holding regarding the stay moot.

*E. Attorney Fees and Costs*

¶18 Finally, Jill argues the trial court erred by denying Jill’s motion to require Martin to pay her attorney fees and costs. Jill contends Martin should have been ordered to pay Jill’s fees and costs because he earns more than her, she lacks the financial ability to pay, and the fees and costs were incurred due to Martin’s actions.

¶19 WISCONSIN STAT. § 767.262(1)(a) permits a court to order a party to pay the reasonable attorney fees and costs incurred by the other for an action affecting the family. Jill cites ***Randall v. Randall***, 2000 WI App 98, ¶22, 235 Wis. 2d 1, 612 N.W.2d 737, where we noted:

> The circuit court in a divorce action may award attorney fees to one party based on the financial resources of the parties because the other party has caused additional fees by overtrial or because the other party refuses to provide information which would speed the process along. The decision whether to award attorney fees is committed to the circuit court’s discretion. (Citations omitted.)

¶20 We conclude the trial did not erroneously exercise its discretion because Martin has not caused additional fees by overtrial, nor has he refused to provide information that would speed the process along. Martin’s opposition to the continued supervised placement Jill sought was supported by the evidence. Also, nothing indicates that Martin has attempted to slow down the process by

failing to provide information. Accordingly, the trial court properly rejected Jill's motions for attorney fees and costs.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.