COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1627

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

IN RE THE MARRIAGE OF:

PATRICIA LORRAINE PRICE,

PETITIONER-APPELLANT,

V.

TIMOTHY MICHAEL PRICE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sawyer County: EUGENE D. HARRINGTON, Judge. *Affirmed in part; reversed in part.*

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

¶1 CANE, C.J. Patricia Price appeals from those portions of the divorce judgment resolving issues of her minor child's primary placement,

imposing indefinite supervised visitation, spousal maintenance and apportionment of financial responsibility for the fees of the court-appointed psychologist and guardian ad litem. She also seeks a new trial before a different judge because of alleged judicial misconduct and bias as well as the appointment of a different guardian ad litem. We affirm the judgment except that portion requiring Patricia to pay $200 monthly maintenance, which we reverse.

¶2 This divorce action was commenced on December 22, 1997. Patricia made several allegations against Timothy suggesting that he might harm their child. Because she argued that Timothy should not have any periods of physical placement with their child, the court appointed a guardian ad litem. Several adjournments were granted at the request of the guardian ad litem in order to permit him to investigate the custody and placement issue. However, in November 1998, Patricia left Wisconsin with their child without Timothy's consent and contrary to the trial court's order providing him with periods of physical placement. She did not return with the child until April 1, 1999. Upon her return, the trial court appointed the Caillier Clinic to perform an evaluation of the parties and the child and to explore the allegations against Timothy. Additionally, the trial court ordered periods of physical placement with Timothy, but in light of the allegations, required the placement be supervised.

¶3 After the final hearing, the court granted the divorce and found that because Patricia had made several false allegations thereby requiring considerable unnecessary litigation expenses, she must pay 75% of the fees for the court-appointed psychologist and the guardian ad litem. Additionally, it granted joint custody to the parties with primary physical placement of the child to Timothy and reasonable visitation to Patricia. It also required Patricia to pay child support in accordance with the percentage guidelines and $200 monthly maintenance to

Timothy. Finally, it divided the marital estate equally with each to pay his or her own attorney fees.

STANDARD OF REVIEW

¶4 On appellate review, a trial court's factual findings will not be set aside unless those findings are clearly erroneous and due regard shall be given to the trial court's opportunity to judge the credibility of the witnesses. WIS. STAT. § 805.17.[1] Under this standard, where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979). Also, the matter of child support is committed to the sound discretion of the trial court. *See* ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996). Whether the trial court properly exercised its discretion is a question of law. *See* ***id***. An appellate court will sustain a discretionary act if the trial court: (1) examined the relevant facts; (2) applied a proper standard of law; and (3) reached a conclusion that a reasonable judge could reach using a demonstrated rational process. *See* ***id***.

¶5 Finally, a trial court has wide discretion in making physical placement decisions. ***In re Wiederholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992). A custody determination depends on first-hand observation and experience with the persons involved and is therefore committed to the sound discretion of the circuit court. ***Gould v. Gould***, 116 Wis. 2d 493, 497, 342 N.W.2d 426 (1984). Thus, a custody determination will not be upset unless

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

the findings of fact are clearly erroneous or the decision represents a clearly erroneous exercise of discretion. ***Id***. at 498.

DISQUALIFICATION OF JUDGE

¶6 Patricia contends that the trial judge harbored a bias against her, thereby precluding her from receiving a fair trial. Essentially, she claims that the trial judge made several remarks during the trial indicating his belief that she was a liar and had no credibility. Additionally, she claims that the judge retaliated against her because she had filed a complaint with the judicial commission alleging his bias. Consequently, she urges this court to grant her a new trial before a different judge.

¶7 In ***State v. American TV & Appliance***, 151 Wis. 2d 175, 183, 443 N.W.2d 662 (1989), our supreme court held that under WIS. STAT. § 757.19(2)(g),[2] it is mandatory a judge be disqualified only when the judge makes a determination that, in fact or in appearance, he or she cannot act in an impartial manner. It does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner. ***Id.*** Nor does it require a disqualification in a situation in which someone can reasonably question the judge's impartiality other than the judge. ***Id.*** The basis for disqualification under § 757.19(2)(g) is a subjective one. ***Id.*** Accordingly, the determination of the existence of a judge's actual or apparent

[2] WISCONSIN STAT. § 757.19 provides in part:

> **(2)** Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> ….
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

inability to act impartially in a case is for the judge to make. ***Id.*** Here, the trial judge determined that he was not biased.

¶8 To the extent that the trial judge made findings or voiced inferences based upon the evidence concerning Patricia's credibility, those comments are not necessarily indicative of misconduct, improper bias or impartiality. Facts learned by trial judges in their judicial capacity cannot be the basis for disqualification. ***State v. Carter***, 33 Wis. 2d 80, 88, 146 N.W.2d 466 (1966). In ***State ex rel. Dressler v. Racine County Circuit Court***, 163 Wis. 2d 622, 644, 472 N.W.2d 532 (Ct. App. 1991), we stated: "We note that not all comments made by a judge during the course of the proceedings are grounds for disqualification. A trial judge may express his or her opinion about counsel's motions without being subject to recusal."

¶9 Here, the comments Patricia claims to be evidence of bias were made only after the trial judge had heard evidence attacking her credibility and also after the trial judge had the opportunity to observe her in these proceedings. For example, the trial judge's comments on her credibility came after the court had received evidence from Dr. Paul Caillier's report and his testimony emphasizing that her levels of deceit, manipulation and hysteria were so great that not even nine years of counseling could cause her to change. Although the trial judge's observations and comments about Patricia were perhaps not a model of judicial restraint and diplomacy, we also recognize that his comments came after he had cumulative evidence demonstrating the breadth and length of her admitted stated untruths.

¶10 We also reject Patricia's contention that the judge retaliated against her because of her complaint against him with the judicial commission. We agree

with Timothy's counsel that, to the contrary, the trial judge's conduct in making the complaint a part of the record was more of an exercise of judicial integrity by revealing his awareness of the complaint. Additionally, the fact that the judge is aware of the complaint does not constitute bias. In ***State v. McBride***, 187 Wis. 2d 409, 418, 523 N.W.2d 106 (Ct. App. 1994), we held that the mere filing of a complaint with the judicial commission against the sitting judge is not sufficient to establish judicial bias. We also observed that there is a presumption that a judge is free of bias. ***Id.*** To overcome this presumption, the party asserting judicial bias bears the burden to show that the judge is biased by a preponderance of the evidence. ***Id.*** at 414-15.

¶11 We agree with the statement in 46 AM. JUR. 2D *Judges* § 150, at 246-47 (1994):

> However, the alleged bias and prejudice of a judge must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case, or from a hearing in a related proceeding. Where the origin of a judge's impressions are inextricably bound up with judicial proceedings, the judge's alleged bias does not stem from an extrajudicial source. Thus the formation of prejudice during a trial as a result of a party's testimony in the trial does not disqualify the judge in the trial in which it was arrived at, even where the judge takes the position that a party has lied on the stand. Moreover, a judge's ordinary and natural reaction to the conduct of, or evidence developed about, a party in a case before him cannot create a disqualification for bias or prejudice.

Here, the record does not support Patricia's claim of improper bias. Her complaints are based entirely upon rulings and observations made by the trial judge in his capacity as the fact finder. [3]

PHYSICAL PLACEMENT

¶12 Patricia contends that the trial court failed to consider the factors set forth in WIS. STAT. § 767.24(5),[4] when making its decision to grant the child's

[3] Because we conclude that Patricia is not entitled to a new trial, it is not necessary to address her argument that there should be a different guardian ad litem at a retrial.

[4] WISCONSIN STAT. § 767.24 provides:

> **(5)** FACTORS IN CUSTODY AND PHYSICAL PLACEMENT DETERMINATIONS. In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one potential custodian over the other on the basis of the sex or race of the custodian. The court shall consider reports of appropriate professionals if admitted into evidence when legal custody or physical placement is contested. The court shall consider the following factors in making its determination:
>
> (a) The wishes of the child's parent or parents.
>
> (b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
>
> (c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
>
> (d) The child's adjustment to the home, school, religion and community.
>
> (e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.
>
> (f) The availability of public or private child care services.
>
> (g) Whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.
>
> (h) Whether there is evidence that a party engaged in abuse, as defined in s. 813.122(1)(a), of the child, as defined in s. 48.02(2).
>
> (i) Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20(1m) or domestic abuse as defined in s. 813.12(1)(a).
>
> (j) Whether either party has or had a significant problem with alcohol or drug abuse.

(continued)

primary physical placement to Timothy and, therefore, erroneously exercised its discretion. We are not persuaded.

¶13 WISCONSIN STAT. § 767.24 sets forth the factors to be considered in custody and physical placement determinations. These factors include the wishes of the child's parents, the wishes of the child and the interaction and interrelationship of the child with his or her parents, siblings and any other person who may significantly affect the child's best interests. The numerous factors also include whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party. WIS. STAT. § 767.24(5)(g).

¶14 In his brief, Timothy refers us to substantial portions of the record showing where the trial court considered: the wishes of the parents; the child's wishes as communicated by Dr. Caillier; the child's relationship with the parents; the child's adjustment to the home, school and community; the mental and physical health of the parties; whether one party is likely to unreasonably interfere with the child's relationship with the other; the allegations that Timothy abused him; and the allegations of Timothy's alcohol abuse. Without describing this evidence, suffice it to say that the record amply shows that the trial court was not only aware of these factors, but that it also considered them when making its decision on the child's primary placement.

¶15 Essentially, Patricia complains that the trial court failed to adopt her view of the weight to be given to the evidence. In particular, although the guardian recommended the child's placement be with the father, she argues that the trial court failed to consider the Caillier report and recommendation that

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(k) Such other factors as the court may in each individual case determine to be relevant.

primary placement be with her. However, the trial court is not bound by such an opinion. *See* ***Wiederholt***, 169 Wis. 2d at 533-34.

¶16 Here, the trial court considered the proper statutory criteria and Patricia's anger toward Timothy as well as her past unilateral decisions to deprive him of visitation with their child. Also, the court was aware of Caillier's report and recommendation as well as the guardian's recommendation. The trial court concluded that, if given custody, Patricia would unreasonably interfere with the child's continuing relationship with her father. This was the primary basis for placing the child with Timothy. The record amply supports this conclusion. The record is replete with evidence demonstrating that Patricia strongly disliked Timothy and would unreasonably defy any continuing attempt to allow a normal father-child relationship. Thus, we are satisfied that the trial court reasonably exercised its discretion when making its placement decision.

PAYMENT OF THE PSYCHOLOGIST'S AND GUARDIAN'S FEES

¶17 Patricia next argues that the trial court erred in exercising its discretion by ordering her to pay 75% of the Caillier bill and guardian ad litem's fees and expenses incurred after November 25, 1998. Those fees incurred before that date were required to be split equally between Timothy and Patricia. November 25 is the date Patricia left Wisconsin with the child, alleging that Timothy was abusing the child. These allegations of abuse were later determined to be untrue. The trial court explained its rationale for the unequal sharing of these expenses: "If Mrs. Price had told the truth, I do not believe we would have had to engage Doctor Caillier and that's the rationale for that. It's clear that Mrs. Price manipulated the court, wasn't forthright. That was a considerable litigation expense that was in all probability not necessary."

¶18 WISCONSIN STAT. § 767.045(6) empowers a court to order either or both parties to pay all or any part of the compensation of the guardian ad litem and the fee and expenses of an expert witness used by the guardian. The percentage of the fees to be paid by each parent is left to the trial court's discretion. ***Lacey v. Lacey***, 45 Wis. 2d 378, 389, 173 N.W.2d 142 (1970). Here, Patricia caused unnecessary expenses by misleading the court with false claims that Timothy was abusing their child. The trial court found that Patricia's misconduct had needlessly protracted the divorce proceedings, occasioned Dr. Caillier's employment and unnecessarily increased the guardian ad litem fees. We fail to see how placing this financial burden on her constituted an erroneous exercise of discretion.

SUPERVISED VISITATION

¶19 Next, Patricia contends that the trial court erred by imposing indefinite supervised visitation on her. In response, however, Timothy indicates that there has been an order superseding this provision and the issue is therefore moot. She has not replied to this argument and we therefore will assume that Timothy's counsel is correct. Consequently, we do not address this issue. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (a proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted).

MAINTENANCE

¶20 Finally, Patricia contends that the trial court erred when, after a December 3 hearing, it awarded Timothy $200 monthly maintenance. On August 6, the trial court denied Timothy's request for maintenance because of

Patricia's inability to pay. However, the trial court held this issue open for reassessment in the event a substantial change of circumstances could be shown. The only issues reserved for a later determination in December were property division and attorney fees. After the August decision, neither party filed a motion to reconsider the maintenance issue, nor did either party argue that a change of circumstances had occurred that would give rise to revisiting the maintenance question. Nevertheless, at the December 3 hearing, the trial court awarded Timothy $200 monthly maintenance. The court later explained at a hearing on Patricia's motion for reconsideration that it considered the property award of $15,074.88 in cash to Patricia as a substantial change of circumstances to justify the maintenance award.

¶21 It is undisputed that the trial court awarded maintenance to Timothy without any notice that the issue would be revisited. Fairness in these proceedings dictate that if the trial court is going to revisit the issue before rendering its final judgment, notice should have been given to Patricia, especially in this instance where it had already rendered a decision denying maintenance. *See* ***In re Estate of Bilsie***, 100 Wis. 2d 342, 356, 302 N.W.2d 508 (Ct. App. 1981) (the essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it). Therefore, without deciding the merits of the maintenance awarded, we reverse that portion of the judgment requiring Patricia to pay Timothy $200 monthly maintenance.

By the Court.—Judgment affirmed in part; reversed in part. No costs on appeal.

Not recommended for publication in the official reports.