COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 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. 2008AP1466 **Cir. Ct. No. 2007FA291**

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

IN THE MATTER OF THE GRANDPARENTAL VISITATION OF MAKAYLA K. W. AND KARTOR J. S.:

KRIS A. KUNSMAN AND MAXINE H. KUNSMAN,

PETITIONERS-RESPONDENTS,

V.

IRVIN WOODBECK,

RESPONDENT,

KURT SCHNEIDER AND ERICA BLESKACEK,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Kurt Schneider and Erica Bleskacek appeal an order granting Kris and Maxine Kunsman grandparental visitation with Bleskacek's two children. Schneider and Bleskacek contend seven circuit court errors entitle them to relief. We disagree and affirm. Additionally, we sanction Schneider and Bleskacek's counsel due to repeated citation of unpublished opinions.

BACKGROUND

¶2 Schneider and Bleskacek live together and are the unmarried parents of Kartor[1] S.[2] Bleskacek and Irvin Woodbeck, who were never married, are the parents of the older child, Makayla W. Maxine Kunsman is Bleskacek's mother. Schneider and Bleskacek stopped allowing Kunsman to visit the children.[3] Woodbeck, however, occasionally permitted Makayla to visit with her grandmother when he had periods of visitation. Kunsman filed an action for visitation under WIS. STAT. § 767.43(3), the "Special Grandparent Visitation Provision."

¶3 Woodbeck, who was also named as a respondent, informed the court he had no objection to allowing the grandparental visitation. The court issued a

[1] The record and briefs indicate another spelling of Kartor's name. We use the version utilized in the caption.

[2] While the background facts are not disputed, Schneider and Bleskacek failed to include citations to the record for the majority of the facts stated throughout their brief, in violation of WIS. STAT. RULE 809.19(1)(d)-(1)(e). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] Although both Maxine and Kris Kunsman were named plaintiffs, the parties referred only to Maxine Kunsman both here and in the circuit court. We therefore refer to Maxine throughout this decision.

temporary order allowing visitation, after the first hearing had to be continued to another date. Following the continued hearing, the court granted Kunsman's petition for visitation. The court also ordered Schneider and Bleskacek to pay one half of the guardian ad litem (GAL) fees, with Kunsman paying the other half.

DISCUSSION

¶4 Bleskacek[4] presents numerous arguments. She first argues Kunsman lacked standing to bring the petition for visitation. Whether a party has standing is a question of law that we decide independently of the circuit court's decision. ***Le Fevre v. Schrieber***, 167 Wis. 2d 733, 736, 482 N.W.2d 904 (1992).

¶5 Bleskacek argues there was no standing because there was an intact family unit, citing ***Van Cleve v. Hemminger***, 141 Wis. 2d 543, 549, 415 N.W.2d 571 (Ct. App. 1987). There, we held that a grandparent does not have standing to petition the court for visitation unless an underlying action affecting the family unit was previously filed. ***Marquardt v. Hegemann-Glascock***, 190 Wis. 2d 447, 526 N.W.2d 834 (Ct. App. 1994).[5] We stated in ***Marquardt***:

> The rationale behind [***Van Cleve***] was that the legislature did not intend to override a parent's determination of visitation unless an underlying action affecting the family unit had been filed, because in such an instance, ordering

[4] We refer to both Schneider and Bleskacek throughout the remainder of this opinion as Bleskacek, unless the context indicates otherwise.

[5] In addition to the cases we discuss, Bleskacek's argument, both here and in the circuit court, relied heavily on two unpublished cases. She also cited a third on appeal. Counsel was aware in the circuit court that one of the cases was unpublished. Additionally, after Kunsman and the GAL noted the violation to this court, Bleskacek discussed the unpublished cases extensively in her reply brief. We therefore sanction Bleskacek's appellate counsel $100 for violating WIS. STAT. RULE 809.23(3). The sanction shall be paid to the clerk of this court within sixty days of the date of this decision.

> visitation with non-parents may help to mitigate the trauma and impact of a dissolving family relationship.

Id. at 453.

¶6 Bleskacek argues there is an intact family, even though she and Schneider are unmarried, thus precluding Kunsman's standing.[6] We reject this argument for two reasons. First, the argument ignores the fact all parents here were not united in their decision because Makayla's father wanted visitation to occur. This disagreement undercuts Bleskacek's argument as to both children, who are raised in the same household. The circuit court determined it would be damaging to Kartor to allow Makayla to have visitation but not him.

¶7 Second, the cases Bleskacek relies on are inapplicable because they dealt with old versions of the visitation statute.[7] Those versions have been carried over into what is now the general visitation statute, WIS. STAT. § 767.43(1). However, § 767.43(2m) states "[s]ubsection (3), rather than sub. (1), applies to a grandparent requesting visitation rights under this section" in certain situations. Subsection (3), the provision under which Kunsman proceeded, has its own rule regarding standing. Subsection (3c) states: "A grandparent requesting visitation under sub. (3) may file a petition to commence an independent action for visitation under this chapter or may file a petition for visitation in an underlying action affecting the family under this chapter that affects the child." Thus, Kunsman has standing under an explicit statutory provision, one that recognizes the alternative, judicially created standing rule announced in ***Van Cleve***.

---

[6] Bleskacek does not specifically address the "underlying action" requirement.

[7] WISCONSIN STAT. § 767.43(2m), (3), and (3c) were created by 1995 Wis. Act 68, §§ 3-4. At that time, they were numbered WIS. STAT. § 767.245(2m), (3), and (3c).

¶8 Bleskacek next presents an equal protection challenge. She argues WIS. STAT. § 767.43(3), which applies only to "nonmarital child[ren] whose parents have not subsequently married each other," unfairly treats unmarried couples differently than married couples. We will not address this issue because Bleskacek failed to serve timely notice of the proceeding on the attorney general. A party is foreclosed from challenging the validity of a statute unless the attorney general is given an opportunity to appear before the court and defend the law as constitutionally proper. ***William B. Tanner Co. v. Fessler***, 100 Wis. 2d 437, 443, 302 N.W.2d 414 (1981) (citing ***Kurtz v. City of Waukesha***, 91 Wis. 2d 103, 280 N.W.2d 757 (1979), and WIS. STAT. § 806.04(11)) (*abrogated on other grounds by* ***Sears, Roebuck & Co. v. Plath***, 161 Wis. 2d 587, 468 N.W.2d 689 (1991)).

¶9 Although a party may still serve the attorney general at the appellate level, ***Fessler***, 100 Wis. 2d at 444, notice must be provided in time to permit a defense against the claim of unconstitutionality. *See* ***Town of Walworth v. Village of Fontana-on-Geneva Lake***, 85 Wis. 2d 432, 437, 270 N.W.2d 442 (Ct. App. 1978). That did not occur here. The first time Bleskacek asserts notice is in her reply brief, where she merely states, "Counsel was aware of the need to serve the Attorney General, and has done so, including this reply, as well as those of the Guardian Ad Litem, and the Respondent." Because any notice was therefore provided when the time for filing briefs had ended, the attorney general was not provided a sufficient opportunity to participate in this appeal.[8]

[8] The respondent's brief was mailed November 18, 2008. As best we can ascertain, allowing for service by mail, the reply brief was therefore due on or about December 8, 2008. *See* WIS. STAT. RULE 809.19(4)(a). The reply brief was accepted for filing on December 11, 2008.

(continued)

¶10 Bleskacek next argues the circuit court erred by not dismissing the GAL due to the appearance of impropriety. Bleskacek's brief provides no citation for her supporting facts, and the record on appeal does not contain any order or transcripts of the hearings where the issue was addressed. Her argument relies on nothing but unsupported conjecture. For these reasons, we deem the issue waived. It is the appellant's burden to supply an adequate record on appeal. ***Lee v. LIRC***, 202 Wis. 2d 558, 560 n.1, 550 N.W.2d 449 (Ct. App. 1996). In the absence of a transcript, we assume the circuit court's decision is supported by the record. ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). In any event, the circuit court has broad statutory authority to appoint a GAL. *See* WIS. STAT. § 767.407.

¶11 Bleskacek next complains it was error to permit the GAL to address the issue of standing. Bleskacek asserts standing should have been decided prior to any other issues in the case, and thus there was nothing for the GAL to address, much less any need for a GAL to be appointed yet. Even if Bleskacek's argument was correct, she created the timing issue herself. Bleskacek acknowledges she did not file her motion objecting to standing until the morning of trial. Further, as the children's advocate, the GAL may provide legal analysis in addition to opinions regarding the children's best interests. Additionally, Bleskacek fails to demonstrate how the alleged error would entitle her to any remedy on appeal. The

---

This court's record contains a letter to the court from the attorney general dated December 30, 2008, stating it received notice of the proceedings and was not requesting to participate. Regardless, Bleskacek failed to demonstrate notice to the attorney general was timely. The letter was not brought to our attention. Further, it was received after the case was submitted for decision and does not indicate when the notice of proceedings was received.

issue of standing is a legal question. Like the circuit court, we have already concluded Kunsman had standing.

¶12 Bleskacek next argues the circuit court erred by issuing a temporary order for visitation. Once again, Bleskacek's argument lacks citation and a transcript and is therefore waived. In addition, the issue is moot because, first, visitation never occurred under the order; second, the visitation would have already occurred; and third, the temporary order is no longer in effect. Thus, resolution of the issue would have no practical effect. Bleskacek is therefore not entitled to review of the order. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

¶13 Bleskacek next asserts the trial court "abused its discretion"[9] when it ordered her and Schneider to pay any portion of the GAL fee, because they were merely trying to vindicate their rights. Additionally, Bleskacek argues the practice of requiring litigants to pay another party's attorney's fees carries a "chilling effect." Determining who pays GAL fees is a discretionary decision. ***Lofthus v. Lofthus***, 2004 WI App 65, ¶33, 270 Wis. 2d 515, 678 N.W.2d 393.

¶14 We first note Bleskacek did not object to paying a portion of the GAL fee prior to or when the circuit court rendered its decision. She first complained of a chilling effect in a letter requesting reconsideration, where she asserted Woodbeck should be required to pay a portion of the fees as well. Thus,

[9] Appellate courts have not used the phrase "abuse of discretion" since 1992 because of its unjustified negative connotations. *See* ***Hefty v. Hefty***, 172 Wis. 2d 124, 128 n.1, 493 N.W.2d 33 (1992). The correct phraseology is "erroneous exercise of discretion."

Bleskacek failed to preserve the issue, except as to whether Woodbeck should share responsibility for the fee.

¶15 Additionally, Bleskacek fails, again, to provide citation to either the circuit court's initial determination or any action taken on the reconsideration request. Bleskacek also does not explain how the court erroneously exercised its discretion or even mention WIS. STAT. § 767.407(6), which authorizes the court to order either or both parties to contribute to GAL fees. The circuit court explained it was not ordering Woodbeck to pay any GAL fees because Woodbeck had not objected to the visitation. This was a reasonable exercise of discretion. Further, as Kunsman points out, the cases regarding a chilling effect are inapplicable, for the reasons stated in her brief.

¶16 Bleskacek's final argument is that Woodbeck should have been dismissed from the action because he was allowing visitation between Makayla and Kunsman. This undeveloped argument lacks any citation to the record or supporting case law. We therefore need not address the argument. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). In any event, there was a dispute between the parents regarding visitation, and we see no reason why Woodbeck should not have been allowed to participate in the proceedings.

By the Court.—Order affirmed; attorney sanctioned.

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