COURT OF APPEALS DECISION DATED AND FILED

December 23, 2002

Cornelia G. Clark
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. 02-1058-FT

Cir. Ct. Nos. 98-FA-104, 99-PA-44

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE MARRIAGE OF:

DALE S.W.,

PETITIONER-APPELLANT,

V.

TANYA T.F.,

RESPONDENT-RESPONDENT.

RALPH M.,

PETITIONER-RESPONDENT,

V.

TANYA T.F.,

RESPONDENT-RESPONDENT,

DALE S.W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Reversed and cause remanded with directions*.

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

¶1 PER CURIAM. In this consolidated post-divorce and post-paternity proceeding, Dale S.W. appeals orders substantially reducing his placement periods with Zachery S.W.[1] He argues that the trial court (1) erroneously excluded Dr. Michael Galli's testimony relevant to Zachery's best interest, and (2) procedurally erred when it entered an order subsequent to its final order. Because the record fails to support the court's exclusion of Dr. Galli's testimony, we reverse the orders modifying placement and remand with directions to admit Dr. Galli's testimony.[2]

¶2 Dale S.W. and Tanya T.W. were married in June 1989. In June 1994, Tanya gave birth to Zachery, whom the parties jointly raised until their divorce in December 1999. Their divorce pleadings alleged that Zachery was Dale's child and temporary orders provided that both share joint legal custody and equal physical placement. The divorce judgment ordered that Tanya have sole legal custody and primary physical placement. It further ordered that Dale have physical placement one evening a week, every other weekend and eight weeks

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[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] Because our resolution of the first claim of error is dispositive, we do not reach the second issue.

during the summer. Major holidays were alternated between the parties. Dale maintained a close relationship with Zachary and exercised his rights to physical placement as scheduled.

¶3 In August 1999, Ralph M. filed a petition for the determination of paternity alleging that genetic testing performed in June 1998 revealed that Dale was not Zachery's biological father, but that there was a 99.97% probability that Ralph was his father. During her marriage to Dale, Tanya never informed him that he may not be Zachery's father, but allowed a significant father-son relationship to develop between them. It is undisputed that until after the parties' divorce, Dale was the only father Zachery knew. During Tanya's marriage to Dale, Ralph, who resided in South Dakota, had no contact with Zachery and never provided any support.

¶4 In February 2000, the court entered a judgment that determined Ralph to be the biological father and required him to pay $450 per month child support. The paternity judgment provided that Ralph have reasonable periods of physical placement with Zachary as agreed between him and Tanya. The judgment required Tanya to consult with appropriate mental health counselors regarding Ralph's introduction to Zachary.

¶5 In February 2001, Ralph, who moved to Green Bay, filed a motion seeking placement periods. Also, Tanya filed a motion to terminate Dale's placement periods. At the hearing, both Tanya and Ralph testified that they spoke to counselors. Ralph testified that he and Zachary had met and had spent time together going to the zoo, Packer games and fishing. He stated that Zachary referred to him as "dad." Tanya testified that she had remarried and that Zachary has a close relationship with her current husband. Dale testified that he continued

to exercise his times of physical placement and that Zachary continued to refer to him as "dad." The guardian ad litem filed a report alleging conflict between Tanya and Dale and concluded that, because conflict existed, Dale's placement times should be reduced. Dale testified to the effect that Zachary had not been exposed to undue conflict between himself and Tanya.

¶6 Dale's attorney sought to introduce testimony of a psychologist who had worked with the parties previously and was available to testify telephonically on the issue whether a reduced placement schedule would have a traumatic effect on Zachary. Dale's attorney stated:

> If we drastically changed this visitation, as is being suggested, what effect it could have on a seven-year-old boy who has strong emotional attachment to a person, and that's one of the considerations that the court cases say you need to take into consideration in looking at the best interest.

Dale's attorney expressed her concern that the guardian ad litem's proposed schedule was "drastically changing that arrangement without any consideration of the effect on this child." Ralph, Tanya and the guardian ad litem objected to psychological testimony.

¶7 The court stated that it did not "want to listen to anybody else but the parties." The trial court denied Dale's request to admit psychological testimony because "the issues are much simpler than I thought they were. The issue is trying to fashion visitation rather than fighting over threshold custody …." During closing argument, Tanya's attorney contended the court should enter an order consistent with the guardian ad litem's recommendation that would "gradually phase the guy out of the picture who's not the real parent here." The trial court issued a February 2002 order granting periods of placement to Ralph and

substantially decreasing placement times with Dale, consistent with that proposed by Zachary's guardian ad litem.

¶8 The new placement schedule provided that for the next twelve months, Dale would have placement one weekend a month and one week in the summer. After the twelve-month period,

> placement/visitation with Dale will be limited to the following: Tanya will ensure that Zachary spends an entire afternoon and evening (not overnight) with Dale each year either on Zachary's birthday or the weekend before or after Zachary's birthday. Tanya will also ensure that Zachary spends an entire afternoon and evening (not overnight) with Dale each year either on Christmas Eve, Christmas Day or the weekend before or after Christmas. … Dale will also continue to have placement/visitation with Zachary every summer for one full week, provided that Dale takes a vacation from work during this week and spends the time with Zachary.

The order also provided that commencing immediately, Ralph have placement one weekend each month. If after twelve months, Ralph lives not more than thirty miles from Zachary, Ralph would have placement every other weekend and one full week during the summer. Dale appeals the order.[3]

¶9 Dale argues that the trial court erroneously exercised its discretion when it denied admission of psychological testimony. We agree. The trial court's exclusion of expert testimony is a discretionary determination that will not be overturned absent an erroneous exercise of discretion. ***Hampton v. State***, 92

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[3] In this case, there is no question that Dale's status as a nonbiological parent is irrelevant to his right to assert placement rights. In the words of the guardian ad litem, "no issue is raised in this appeal regarding Dale's right to assert placement rights[,]" and "[t]he guardian ad litem does not oppose Dale having periods of placement with Zachary even though he is not a biological parent." Tanya joined in the guardian ad litem's brief.

Wis. 2d 450, 457-58, 285 N.W.2d 868 (1979). To be admissible, expert testimony must be relevant and assist the trier of fact in understanding the evidence or deciding a fact in issue. ***State v. Richard A.P.***, 223 Wis. 2d 777, 791, 589 N.W.2d 674 (Ct. App. 1998). The trial court's decision will be upheld if it is supported by a logical rationale, is based on facts of record and involves no error of law. ***Id.*** We may independently review the record to determine whether it provides a reasonable basis for the trial court's exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶10 We start with the premise that Dale was granted ample physical placement at the time of the divorce because it was determined to be in Zachary's best interest to continue a close relationship with the only father he had ever known. The record reveals no evidence that Dale and Zachary's relationship was harmful in any way to Zachary.[4] There is no question that the substantial reduction in placement envisioned would dramatically alter Dale's relationship with Zachary. In the words of Tanya's counsel, it would essentially "phase the guy out of the picture …."

¶11 In response to the plan to phase him out, Dale offered expert testimony on the issue whether substantially reducing the period of time he was to spend with Zachary would be psychologically damaging to Zachary. The court's reasons for excluding this testimony do not bear scrutiny. The court explained that

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[4] Although there is a dispute whether Dale's and Tanya's conflicts spilled over to Zachary, the parties point to no evidence indicating that Zachary was anything but a healthy and well-adjusted child at the time of the hearing. During closing arguments, Tanya's lawyer argued to the court: "This would be a lot easier decision for you if Dale [W.] was a bad guy, and I'm not gonna say he's good, bad, or indifferent. … But if he was a bad guy, we could all agree on that. It would be real simple. You're out of the picture here."

it rejected the testimony because the issue in question was "visitation rather than fighting over threshold custody." Under WIS. STAT. § 767.325(1)(b)1a, after a two-year period the trial court may modify a physical placement schedule if, among other factors, "[t]he modification is in the best interest of the child." Also, in modifying placement, "[t]he court shall consider the factors under [WIS. STAT.] § 767.24 (5) …." WIS. STAT. § 767.32(5m). These factors include the "[t]he reports of appropriate professionals if admitted into evidence." WIS. STAT. § 767.24(5)(jm). Because the question whether Zachary would be psychologically damaged by this plan is relevant to a determination of his best interest, the proposed testimony was relevant and would assist in deciding a fact in issue. The court's explanation that the issue involved merely visitation, not custody, fails to provide a rational basis for the exclusion of the psychologist's testimony.

¶12 Tanya and the guardian ad litem argue nonetheless that the court properly denied the admission of the psychologist's testimony because Dale's counsel failed to follow the appropriate procedure in admitting telephonic testimony. Because the court did not rely on this basis for rejecting the testimony, this reason is mere speculation and does not persuade us.

¶13 Tanya and the guardian ad litem further argue that this court cannot review the issue because the hearing transcript consists of a "'hodge-podge' assortment of various statements and arguments from all four attorneys mixed with questions and comments from the court" and Dale's offer of proof was inadequate. They further contend: "Dale's attorney made no offer of proof regarding the nature of the proffered evidence or even who was going to give it." The record belies this contention.

¶14 Dale's counsel mentioned a number of times that Dr. Michael Galli was involved in the initial custody and placement evaluation and stated: "I did contact, as I indicated Dr. Galli, and Dr. Galli said he would be available by phone at 1:00 pm" to give opinion testimony on whether "[I]f we drastically changed this visitation, as is being suggested, what effect it could have on a seven-year-old boy who has a strong emotional attachment to a person …." Because counsel clearly stated that counsel desired to call the psychologist who previously consulted with the parties to testify whether the proposed placement change was psychologically damaging, counsel essentially complied with WIS. STAT. § 901.03(1)(b).[5]

¶15 In any event, "regardless of whether the proper motion or objection appears in the record," this court may reverse in the interest of justice. WIS. STAT. § 752.35. The court of appeals has broad powers of discretionary reversal. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

> This broad statutory authority provides the court of appeals with power to achieve justice in its discretion in the individual case. The first category of cases arises when the real controversy has not been fully tried. Under this first category, it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial. The second class of cases is where for any reason the court concludes that there has been a miscarriage of justice.

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[5] WISCONSIN STAT. § 901.03 reads:

> (1) EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
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> ….
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> (b) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

> Under this second category of the statutes, an appellate court must first make a finding of substantial probability of a different result on retrial.

Id.

¶16 This court has relied on this first category of the statute to reverse judgments in many situations, including evidentiary situations. We have concluded that the real controversy was not fully tried in cases where important evidence was erroneously excluded, thereby depriving the fact finder of the opportunity to hear testimony that bore on an important issue in the case. ***Id.*** Because we conclude that important expert testimony bearing on the psychological effect of a significantly reduced placement schedule with Dale was erroneously excluded, we conclude that the issue of Zachary's best interest was not fully tried. Therefore, we reverse the orders modifying placement and remand with directions to admit Galli's testimony.

By the Court.—Orders reversed and cause remanded with directions.

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