

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 31, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-3406

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE PATERNITY OF
TRAVIS E. C.:

TRAVIS E. C., BY HIS GUARDIAN
AD LITEM DALE E. HUGHES,

Appellant,

v.

CARL C.,

Respondent.

APPEAL from orders of the circuit court for Sauk County: JOHN A. CURTIN, Judge. *Vacated and cause remanded with directions.*

Before Eich, C.J., Sundby and Vergeront, JJ.

PER CURIAM. In this appeal, we decide that a retired circuit court judge acting as a reserve judge but without assignment may not enter findings of fact, conclusions of law and an order in an action where he was the

presiding judge before his retirement. We therefore vacate the order dismissing the State's petition to determine the paternity of Travis E.C. and remand the cause to the circuit court. On remand, the circuit court may enter such findings, conclusions and order as it considers are supported by the record. Because § 757.08, STATS., permits a successor judge to continue proceedings begun before his or her predecessor, the circuit court may hold such hearings and order such additional briefing as it considers appropriate.

On March 19, 1993, the Sauk County Circuit Court, Hon. Robert F. Curtin presiding, orally granted respondent's motion to dismiss the State's petition to determine Travis's paternity. The court ruled that the State, acting through the Sauk County Child Support Agency, had failed to prosecute the action. The court therefore dismissed the action pursuant to § 805.03, STATS.¹

On March 29, 1993, respondent submitted proposed Findings and Order For Dismissal to the court. Travis's guardian ad litem objected to the findings and submitted proposed amendments, to which respondent objected. The parties filed extensive letter briefs.

Judge Curtin retired before he could act further. However, on September 20, 1993, Judge Curtin, acting as a reserve judge but without assignment, entered findings of fact, conclusions of law, and an order dismissing the State's petition. Travis, by his guardian ad litem, appeals. He

¹ Section 805.03, STATS., provides:

For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12 (2) (a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

raises several issues. Because we conclude that Judge Curtin could not act in the matter without assignment pursuant to § 751.03(1), STATS.,² we do not reach the remaining issues.

The respondent argues that Judge Curtin orally granted respondent's motion on March 19, 1993, and his entry of the September 20, 1993 order was a ministerial act. See *Comstock v. Boyle*, 134 Wis. 613, 617, 114 N.W. 1110, 1111 (1908). We conclude that *Comstock* applies only where it is clear that the court intends that judgment will be entered on its oral decision. Here, the court allowed extensive letter briefs arguing the merits of its decision and considered amended findings which would have made the dismissal order applicable to the State and Travis's mother but would not have dismissed Travis's claim with prejudice. Regardless of the trial court's intent when it made its oral decision, there remained issues to be decided before the court entered judgment. Indeed, the trial court in its oral decision did not address the guardian ad litem's principal argument--that Travis had not failed to prosecute this action diligently and his claim could not be dismissed with prejudice under § 805.03, STATS. Nor did the court address that argument in its findings, conclusions and order entered September 20, 1993.

We conclude that Judge Curtin's order of September 20, 1993, was not merely a ministerial act which formalized a final decision made during his term of office. The matter should have been disposed of by Judge Curtin's successor, the Hon. Patrick J. Taggert, pursuant to § 757.08, STATS.³ Judge

² Section 751.03(1), STATS., provides:

The chief justice of the supreme court may assign any active supreme court justice, court of appeals judge or circuit judge to serve temporarily as a judge of the court of appeals or any circuit court to aid in the proper disposition of business in that court. The chief justice of the supreme court may designate and assign reserve judges under s. 753.075 to serve temporarily in the court of appeals or the circuit court for any county. While acting under a temporary assignment, an active or reserve justice or judge may exercise all the authority of the court to which he or she is assigned.

³ Section 757.08, STATS., provides:

Taggert's memorandum decision entered December 17, 1993, denying the guardian ad litem's motion for relief from Judge Curtin's order, does not cure the defect in Judge Curtin's order.⁴ Under § 757.08, Judge Taggert must exercise his own discretion; his memorandum decision was a review of Judge Curtin's decision. On remand, Judge Taggert shall proceed in this matter as directed by § 757.08.

By the Court.--Orders vacated and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

(..continued)

No process, proceeding or action, civil or criminal, before any court of record shall be discontinued by the occurrence of any vacancy in the office of any judge or of all the judges of such court, nor by the election of any new judge or judges of any such court, but the persons so elected shall have power to continue, hear and determine such process, proceedings or action as their predecessors might have done if no new election had been held.

⁴ Travis also appealed from this decision. We direct the trial court to vacate Judge Taggert's order because he lacked jurisdiction (competency) to determine whether Judge Curtin's order was valid.