COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3308

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

IN RE THE MARRIAGE OF:

JANELL S.,

PETITIONER-APPELLANT,

V.

J. R. S.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

DYKMAN, P.J. This is an appeal from an order denying Janell S.'s post-trial motion to deny J.R. S.'s physical placement rights to their son, Jake. The same order also granted J.R.'s motion to hold Janell in contempt of court for

refusing to permit Jake's physical placement with J.R., and a further order denied Janell's motion for reconsideration. Janell also appeals from these determinations. Because we conclude that the real controversy in this case has not been fully tried, we will exercise our discretionary power of reversal found in § 752.35, STATS., and remand for a new trial.

This post-trial divorce proceeding began with two nearly-contemporaneous motions by the parties. J.R. moved to enforce his physical placement rights with his son, Jake. His ex-wife, Janell moved to terminate J.R.'s physical placement rights because she believed that J.R. had abused Jake. After a mediation attempt failed, the trial court appointed a guardian ad litem for Jake, and a psychologist, Dr. Harlen Heinz, to furnish an evaluation of Jake, J.R. and Janell.

The issue of the amount of time necessary for the hearing of the parties' motions began on April 15, 1996, when Tim Osicka, Janell's attorney, wrote the trial judge and enclosed Janell's motion papers. Apparently, Osicka had received J.R.'s motion because he informed the judge that he was setting his motion at the same time as J.R.'s motion. He said: "I don't know how much time the Court has set aside on this date, but I would certainly anticipate at least a full day trial on this matter." J.R.'s attorney, Kathleen Mann, responded to Osicka's letter a week later, and observed:

> When I set my motion on July 16, 1996 in this matter, your calendar clerk allotted me 1.5 hours. Mr. Osicka wrote the Court a letter on April 15, 1996, stating that he needed a full day. Obviously this issue should be addressed now, rather than later. I know Mr. Fox will need some time as the Guardian *ad litem* ….
>
> Please instruct me if we should talk to the Clerk of Court about a full day or whether we should leave the date as set. I do not believe a full day is necessary ….

The record does not reveal how or whether this potential problem was solved. But there was apparently some personal animosity between Mann and Osicka because Osicka wrote the court on July 15, withdrawing a motion for unspecified "relief concerning Kathleen Mann."

The July 16 hearing began badly. The trial court asked Osicka why he had sent a fax copy of a doctor's report to the Jackson County Clerk's Office. Osicka replied that the report supported a motion for a continuance that he intended to make. The judge was concerned that Osicka's motion together with the report suggested that Osicka was intending to testify. The judge also criticized Osicka for filing a motion to disqualify the guardian ad litem for no reason other than Osicka's displeasure with the guardian ad litem's proposed recommendation. And the judge interpreted some correspondence as Osicka accusing Mann of the crime of intimidating a witness. Osicka denied any improper motive in sending the fax and termed the dispute with Mann a mistake. After some sparring between Osicka and Mann, during which the court asked Osicka whether he was trying to mislead the court, the court denied both Osicka's motion for a continuance and his motion to remove the guardian ad litem. The judge noted that the arguments on the motions had taken about an hour, leaving about two hours for the hearing. The judge then sent Osicka, Mann and Fox to the jury room for ten minutes to try and resolve the matter. The conference took forty minutes. The judge noted:

> [I]t's now twelve minutes after 3:00 and we're going to quit at 4:30. As we're aware, … we're not going to conclude the hearing today and I'm not going to preclude anybody from calling whatever witnesses they want in this proceeding. However, I do expect I'm going to enter a temporary order of some sort today which will be an interim order until a final decision is made in this court.

The parties agreed that they would take the testimony of Dr. Heinz. His testimony was that after evaluating Janell, J.R. and Jake, he concluded that Janell exhibited parental alienation syndrome, which he described:

> Parental Alienation Syndrome is a syndrome that is used to describe when a parent for whatever reason fears the involvement of the child with the other parent or for whatever reason keeps that child from the other parent or says things or does things that will undermine the relationship between the parent and the child.

Dr. Heinz believed that Janell's actions were harmful to Jake. On cross-examination, he testified that even if a pathologist and a plastic surgeon testified that cigarette burns found on Jake after physical placement with J.R. were intentionally caused, he would discount that evidence because he did not "believe that a plastic surgeon has any corner on the market with respect to determining a purposeful act."

No other witnesses were called. Dr. Heinz was examined and cross-examined extensively by Osicka, Mann and Fox. However, the hearing was adjourned before Heinz's testimony was complete.

In Janell's motion for reconsideration, Osicka's secretary explained in an affidavit that she was the one who handled the scheduling for the adjourned hearing. She said that she had a scheduling conference with the trial court's clerk on July 17 concerning the time for the adjourned hearing. She noted that she was told by the clerk that the court had scheduled ninety minutes per side for July 25, because that was when Dr. Heinz would be available. Her affidavit continued:

> Your affiant, however, was not told by Judge Radcliffe's clerk that 90 minutes was all that each party would get in this entire matter; in other words, your affiant was advised that as to July 25 only, the Court only had 90 minutes of court time for that date.

> That your affiant indicated to Judge Radcliffe's scheduling clerk that she would see if Mr. Osicka could make room for July 25th date … but that her boss, Tim Osicka, would need more time and dates down the road to schedule the petitioner's experts in this matter (namely Dr. Eugene Schrang, Dr. William Bauman and Betty Cameron, a psychologist treating Jake S[.]).
>
> This affiant wants to stress that at no time did Judge Radcliffe's clerk advise this affiant that July 25th would be the last hearing date in this matter.

The July 25th hearing began with the court's explanation of its schedule:

> This matter was before the court on July 16th at which time the parties were unable to plead their presentations to the Court. Because of the circumstances involved, the Court rescheduled the matter to this morning…. [I]f it was not possible to get the matter on today it would likely be a month or more before it could get back on the Court's calendar. So in that regard the Court has a limited amount of time to devote to the matter and I have advised counsel that—to restrict each of you to an hour and-a-half today and that will include not just direct examination but also your cross-examination of witnesses. So you can use that time in any way you wish and any way [that's] appropriate. But I am going to enforce that time limit on each of the parties.

The hearing began with Osicka's cross-examination of Dr. Heinz. When he finished, Mann called the court's attention to the fact that this had taken thirty-five minutes. Mann then examined J.R., J.R.'s mother, four of J.R.'s friends and Dr. Heinz. From time to time, the court noted the time taken for direct or cross-examination. The following eventually occurred:

> MR. OSICKA: My understanding is that you [the court] want to get some evidence in today which is why you scheduled it today. We have other time and other time limits.
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> THE COURT: I'm not sure that is the fact.
>
> MS. MANN: That was not my understanding.

> THE COURT: No. You are going to present the evidence that you want to be considered by the Court today.
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> MR. OSICKA: Your Honor, I think I indicated that I could not get my doctors in here.
>
> THE COURT: Well, there are other things that you can do. I expect to make the decision on the basis of evidence that's presented here today.
>
> MR. OSICKA: Well, I guess I'll have to go to motions, Your Honor, because my understanding was we were going to squeeze it in this morning –
>
> THE COURT: What your understanding is that I was going to take the 90 minutes for each of you on Ms. Mann's case and you were going to have whatever time you wanted sometime in the future? That is not the way this Court operates and you were told that, Mr. Osicka. You were told that very specifically to come to Court this morning and to be prepared with your witnesses and your examination. And you were to have 90 minutes and I'll see that you get it.

There followed a lengthy explanation by Osicka concerning his stated belief that the July 25th hearing would not be the last hearing in the matter, and the court's explanation that Osicka had had enough time to present a case if he had budgeted his time properly and brought the witnesses he intended to call to court. Osicka then finished cross-examining J.R., and after more arguing about his understanding as to a future hearing, the court heard closing statements.

The court then gave its decision. It began by noting that Osicka had spent the two hearings allotted on irrelevancies and minutia. It noted that "[n]obody has come forward to say different and there is no evidence to, I understand, indicate that [J.R.] has ever intentionally abused this child." It noted that Janell had not testified, nor had other witnesses who had been present in court. The court concluded that Janell had intentionally interfered with J.R.'s physical placement of Jake. It viewed this as contemptuous conduct and sentenced Janell to six months confinement in the Jackson County jail. It permitted her to purge

the contempt by ceasing her interference with Jake's physical placement with J.R. It required her to obtain counseling for herself and Jake.

Janell moved for reconsideration, attaching four affidavits. We have discussed one of them. The other three were by Janell, Dr. Billy J. Bauman and Betty Cameron. We find significant the affidavits by Dr. Bauman and Betty Cameron. We take the following information from their affidavits.

Dr. Bauman is a medical doctor and a professor of pathology at the University of Wisconsin School of Medicine. He is a forensic pathologist for the Wisconsin State Crime Laboratory, and on the staffs of various hospitals. He is the primary pathology consultant for Dane and Jefferson counties. He is certified in anatomic and clinical pathology. He reviewed investigative reports regarding cigarette burns to Jake and photographs taken of multiple burn injuries of Jake's hands and the trunk of his body taken on August 1, 1994. He concluded:

> Based on my 35 years of experience as a forensic pathologist, having performed about 4000 autopsies and reviewing as an expert witness many cases of physical abuse including burn injuries, it is my definite opinion that Jake S[.] sustained multiple deliberately inflicted cigarette burns to his hands and arm apparently inflicted by his father. In no way were these multiple burns accidental as indicated by the father. The burning cigarette was held in contact with the skin a sufficient amount of time to cause third degree burns. Brushing the skin with a lit cigarette does not cause third degree burns. The linear burns he sustained to the trunk of his body were possibly accidental.
>
> Having performed many autopsies on children who were victims of abuse, I feel it necessary to express my very strong opinion that this child's father should never be granted unsupervised contact with Jake in the future since such a deviant and abusive behavior pattern tends to be repetitive and is potentially lethal.

Dr. Bauman reviewed the transcripts of the July 16 and July 25 hearings as they pertained to the cigarette burns to Jake. The testimony that the

burns were accidental notwithstanding, his affidavit concluded: "That your affiant is conversant with cigarette burns that are intentionally caused, has examined and corroborated cigarette burns that are intentionally caused including through torture and that the cigarette burns observed by this affiant are consistent with that sort of scenario."

Betty Cameron is licensed as an advanced practice social worker with a masters degree in marriage and family therapy. She has had training and clinical experience in assessing child abuse and parental alienation syndrome. She had therapy sessions with Jake since April of 1996. She read the transcript of Dr. Heinz's testimony. Her affidavit provides:

> This affiant is deeply concerned about J.R.'s parenting skills as "he could react with a quick temper to frustrations of his immediate wishes. With provocation, he could be disruptive to others, either because of his temper or through his impulsiveness." (Quoting MMPI profile) This affiant is appalled that based on J.R.'s MMPI profile, J.R. was taken at his word by Dr. Heinz for alcohol consumption and explanations of hostile behavior….
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> ….
>
> For Dr. Heinz to state that your affiant's opinions are "not well founded and were unproductive" smacks of unprofessionalism and almost blatant disregard for the patient/therapist relationship that this affiant and Jake S[.] enjoy. This affiant is further concerned about Dr. Heinz' motivation. Given the MMPI results, Dr. Heinz' assessment as to visitation is one-sided and appears gender biased….
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> For Dr. Heinz to testify as he did, in my opinion disregarding the concerns Social Services had, Dr. Krohn had, the opinions hypothetically shared with Dr. Heinz re a pathologist and plastic surgeon as to third degree burns places Dr. Heinz in a position of an advocate for J.R. S[.] rather than a psychologist looking out for the best interests of Jake.
>
> If Dr. Heinz had ever bothered to discuss the issue of parent alienation syndrome with this affiant, this affiant would have advised Dr. Heinz that Jake showed no symptoms of parent alienation syndrome.

This is startling information. Had Osicka presented the testimony of Dr. Bauman, the plastic surgeon referred to, Betty Cameron and other social services employees, the trial court would have heard that Jake was in substantial danger of being the victim of potentially lethal child abuse at the hands of his father. Had Osicka called Janell, the court could have compared her credibility with that of J.R. But the court was unable to do this because Osicka failed to do so.

It would be unproductive for us to try to determine why Osicka failed to call these witnesses. Nor are we prepared to determine the extent of examination and cross-examination necessary to adequately present Janell's case. Osicka and Mann have diametrically opposed views of this, without even factoring in the views of the guardian ad litem. Osicka's attempts to obtain a continuance could be interpreted as an attempt to "back door" opposing counsel, or as a documented explanation of why he needed a continuance. His attempt to remove the guardian ad litem could be the result of his displeasure with an expected recommendation or his belief that the guardian ad litem was not adequately investigating the information Osicka had obtained.

Counsel's good or bad faith in his interaction with the court, his diligence or lack of diligence in obtaining the evidence he needed, his personal behavior in court, and his relationship with opposing counsel do not concern us. This case is not about counsel. It has to do with the present and future welfare of a young boy. We rarely invoke our statutory power of discretionary reversal found in § 752.35, STATS. But we may do so when we conclude that the real controversy was not fully tried. We so conclude, for the reasons we have given, and therefore, we remand the matter for a new trial. We need not determine whether the

outcome on retrial would be different. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805 (1990).

Janell asks that we order a retrial before a different judge. We decline to do so. There is no reason to believe that she cannot receive a fair hearing and enough time to adequately present the testimony she believes will prove her position. A trial judge's unhappiness with counsel's method of presenting a case is not a reason to assume bias. Judges are people too, and cannot be expected to be pleased with all attorneys. But this case is not about counsel; it is about Jake.

No costs to either party.

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

Not recommended for publication in the official reports.