

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 2, 2004

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. 04-1290
STATE OF WISCONSIN

Cir. Ct. No. 94PA000050

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE PATERNITY OF JAMES L.C.:

NJARI CROSBY,

PETITIONER-APPELLANT,

V.

JAMES H. ANDERSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County:
RANDY R. KOSCHNICK, Judge. *Reversed and cause remanded.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Njari Crosby appeals an order dismissing her motion to modify custody and placement for the parties' minor child. She challenges the procedure by which the trial court denied her motion without an

evidentiary hearing. We conclude that an evidentiary hearing is necessary to resolve the matter. We therefore reverse.

¶2 In 1995, the trial court adjudicated James Anderson the father of Crosby's son, James L.C. (date of birth 3/25/94). Crosby obtained sole legal custody and primary physical placement of James. In 1996, the court transferred legal custody and primary physical placement to Anderson.

¶3 In July 2003, Crosby moved to modify the 1996 custody and placement order. Crosby's affidavit presented grounds for the motion that included her changed living circumstances; physical and emotional abuse of the child, primarily by his stepmother; James's mental and emotional problems; his inappropriate and sometimes violent behavior; continued interference with Crosby's relationship with James; and refusal to provide Crosby with school and medical information concerning James. In some cases, the affidavit generally asserted these circumstances and, in other cases, described specific acts.

¶4 Anderson moved to dismiss the motion, arguing that it failed to allege facts constituting a substantial change in circumstance. The family court commissioner ordered the parties to contribute \$500 each to guardian ad litem fees, and to provide the guardian ad litem with additional affidavits, expert opinions, or reports supporting their positions. The court commissioner's order provided that the parties and the guardian ad litem would then determine if an evidentiary hearing on the motion was needed, or if the court commissioner could decide the motion on the written submissions.

¶5 Anderson subsequently submitted a substantial number of reports and affidavits. Crosby submitted none. Also, Crosby did not pay the \$500

guardian ad litem fee, although it was subsequently learned that this was not Crosby's fault, but her attorney's.

¶6 Anderson again moved to dismiss, this time on the grounds that Crosby had failed to pay the guardian ad litem fee and had failed to provide additional affidavits or reports. Two months after the court commissioner's initial order, the court commissioner granted Anderson's motion to dismiss, both on the merits and for failure to prosecute under WIS. STAT. § 805.03 (2001-02).¹ The court commissioner reasoned that Crosby's failure to file additional submissions in support of her motion and her failure to pay the guardian ad litem fee amounted to a failure to prosecute her motion.

¶7 Crosby moved the trial court for *de novo* review of the court commissioner's dismissal. The trial court set aside the court commissioner's ruling on the merits. With respect to the merits, the court correctly concluded that it was necessary to make credibility determinations to decide the motion, which the court could not do, in the absence of a stipulation, on written submissions. However, the trial court upheld dismissal of the motion based on Crosby's failure to prosecute. In the court's view, the failure to prosecute included both Crosby's failure to pay the guardian ad litem fee and, more importantly, her failure to submit additional affidavits and reports that the court commissioner ordered. Crosby appeals that determination.

¶8 Under WIS. STAT. § 805.03, the trial court may dismiss an action for failure to prosecute it. The trial court's authority under this section is

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

discretionary. See *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 274-75, 470 N.W.2d 859 (1991). We will affirm a discretionary decision if the trial court considers relevant facts of record, applies the correct legal standard, and reaches a reasonable result. *Palmerton v. Associates' Health & Welfare Plan*, 2003 WI App 41, ¶9, 260 Wis. 2d 179, 659 N.W.2d 183, *review denied*, 2003 WI 32, 260 Wis. 2d 754, 661 N.W.2d 102 (No. 02-1741).

¶9 WISCONSIN STAT. § 802.01(2) provides that a motion shall be made in writing, shall state with particularity the supporting grounds, and shall set forth the relief sought. Crosby's motion satisfied those standards. At a minimum, Crosby alleges that she has observed behavioral changes in James L.C., and if her live testimony on this topic were believed, it would constitute a substantial change in circumstance. Having satisfied the statutory standard for her motion, she was under no obligation to supplement, amend it, or submit further support in the form of affidavits or reports. Therefore, her subsequent failure to do so was irrelevant. Crosby is entitled to a decision on the merits of the motion and, as the trial court observed, a decision on the merits requires a hearing.

¶10 The only remaining basis for a WIS. STAT. § 805.03 dismissal was counsel's failure to forward Crosby's guardian ad litem payment. The trial court stated, however, that "[i]f that were the only failing I would not be granting the motion to dismiss for failure to prosecute" That discretionary determination, in Crosby's favor, is not challenged on appeal.

¶11 We pause to make two comments. First, the trial court correctly concluded that many assertions in Crosby's affidavit are irrelevant. Second, there is material in the record in this case suggesting that Crosby may have difficulty in proving her factual allegations. However, the credibility of her allegations

regarding James L.C.'s behavior and the alleged causes thereof are matters that, absent a stipulation, can only be resolved by live testimony. Thus, although the court commissioner and the trial court may have been motivated by a desire to avoid painful litigation, based on the record before us we see no alternative.

By the Court.—Order reversed and cause remanded.

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

