

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 22, 2005**

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. 2004AP2430**

**Cir. Ct. No. 1999PA109**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE PATERNITY OF L.L.S.:**

**JESSICA A. RUSCH F/K/A JESSICA A. BAUER,**

**PETITIONER-APPELLANT,**

**RAYMOND E. KREK, KREK & BRANTMEIER AND S.C.,**

**APPELLANTS,**

**V.**

**ADAM D. STEINKE,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Jefferson County:  
RANDY R. KOSCHNICK, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Jessica Rusch appeals a post-paternity order reaffirming a dismissal of Adam Steinke’s motion to modify physical placement of their shared child, but denying Rusch’s request for attorney fees arising from Steinke’s unsuccessful motion and ordering Rusch to pay Steinke \$1200 in attorney fees for overtrial following the dismissal of the motion. Rusch’s attorney, Raymond Krek, and his firm, Krek & Brantmeier, S.C., (collectively, Krek) separately appeal from that portion of the order requiring them to pay Steinke \$3600 in attorney fees for overtrial. For the reasons discussed below, we affirm the trial court’s order in all respects.

### **BACKGROUND**

¶2 The parties stipulated to a physical placement schedule for their child in August 2002. After Rusch moved for child support, Steinke moved for relief from the stipulated placement order under WIS. STAT. § 806.07 (2003-04),<sup>1</sup> which the trial court denied without costs or attorney fees to either party, by order dated April 10, 2003.

¶3 Steinke also moved to modify the placement schedule. On November 18, 2003, after placement studies not only failed to support Steinke’s position but instead suggested additional conditions for his own period of physical placement based on alleged alcohol and domestic abuse problems, Steinke moved to dismiss his placement modification motion. Rusch opposed the dismissal of Steinke’s motion without a ruling on its merits or possible consideration of additional conditions upon Steinke’s continued exercise of his periods of physical

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

placement based on the abuse concerns cited in one of the placement studies. In the alternative, Rusch asked the court to condition the dismissal of Steinke's motion upon an award of attorney fees in her favor. At a hearing held on November 19, 2003, the court orally dismissed Steinke's placement modification motion without conditions and refused to further consider Rusch's request to impose additional conditions on Steinke's physical placement because she agreed there had been no substantial change of circumstances. The court left open the possibility that Rusch could file a separate motion for attorney fees based on overtrial or frivolousness and the parties agreed to wait to circulate an order to be signed by the court until the issue of attorney fees had been settled.

¶4 On December 2, 2003, Rusch filed a "Notice of Motion for Modification of Placement, Award of Attorney's Fees and Legal Expenses, and Reconsideration of Withdrawal Order." In response to that motion, Steinke sought clarification as to whether the court intended to consider or reconsider: (1) whether to attach attorney fees as a condition of the dismissal of his modification motion; (2) whether to award attorney fees related to the WIS. STAT. § 806.07 motion; (3) whether to award attorney fees relating to his modification motion; and (4) whether to impose additional conditions on his own placement. Rusch then filed a second motion for reconsideration, with an accompanying brief. On December 19, 2003, notwithstanding the parties' prior discussion about waiting to circulate an order for approval as to form, the trial court entered its own written order noting that "[t]he court's unequivocal ruling on November 19, 2003 was that, as to all previously filed and then-pending motions, [Rusch's counsel] Attorney Krek would be allowed to pursue only his request for attorney fees, costs and expenses based on claims of overtrial and/or frivolousness related to

respondent's motion to change placement" and that the court "stands by its previous rulings in all respects."

¶5 The trial court considered Rusch's attorney fees motion at a hearing held on April 19, 2004, and continued on May 11, 2004. At that hearing, Steinke made his own request for attorney fees based on overtrial following the dismissal of his placement modification motion and he subsequently filed a written motion to that effect. The trial court ultimately denied Rusch's request for attorney fees and awarded Steinke \$4800 for attorney fees, with \$1200 of that amount apportioned to Rusch and \$3600 apportioned to Attorney Krek.

## DISCUSSION

¶6 We begin by clarifying the scope of this appeal. Rusch devotes considerable space in her brief explaining why she believes the trial court erred in refusing to condition the dismissal of Steinke's placement modification motion upon the payment of attorney fees and in refusing to consider her counter-motion to place conditions upon Steinke's continued physical placement. Those issues are not properly before us, however, because they were decided in a final written order entered on December 19, 2003, which was not timely appealed.<sup>2</sup> See WIS. STAT. RULE 809.10(4) (limiting our jurisdiction to final judgments or orders); *Campbell v. Campbell*, 2003 WI App 8, ¶11, 259 Wis. 2d 676, 659 N.W.2d 106 (noting a judgment or order which disposes of the substantive matters in dispute is final, even though it leaves the question of attorney fees open); and WIS. STAT.

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<sup>2</sup> Although neither party addresses the finality of the December 19, 2003 order with regard to the issues decided at the November 11, 2003 hearing, this court is obligated to consider its own jurisdiction *sua sponte*. *Worthington v. Farmers Ins. Exch.*, 64 Wis. 2d 108, 109, 218 N.W.2d 373 (1974).

§ 808.04(1) (allowing 90 days to appeal from an order in a civil case). The possibility that counsel may not have expected the trial court to enter a written order addressing issues decided at the November 19, 2003 hearing until the attorney fees issue was resolved does not alter the fact that the court did, in fact, enter an order plainly stating those issues had been decided. To the extent that the July 30, 2004, order which is the subject of this appeal may have mentioned any of the issues already covered in the December 19, 2003 order, such reconsideration did not extend the time to appeal. *See Silverton Enterprises, Inc. v. General Cas. Ins. Co.*, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988) (limiting our jurisdiction over orders denying reconsideration to those issues which were not determined in the order from which reconsideration was sought). Therefore, the only issues properly before us on appeal are those relating to the parties' opposing motions for attorney fees based on overtrial.

¶7 Rusch contends the trial court should have granted her attorney fees for overtrial based on her theory that Steinke filed his placement modification motion in retaliation for her child support motion, solely for the purpose of harassing her. The trial court, however, refused to make any finding as to Steinke's actual motivation in filing the motion. Rather, the court viewed the test for overtrial as being focused "on the approach to litigation or the manner of litigation, whether unnecessary proceedings were necessitated by virtue of the conduct of one of the litigants."

¶8 We agree with the trial court's view of the relevant test. As we explained in *Zhang v. Yu*, 2001 WI App 267, ¶13, 248 Wis. 2d 913, 637 N.W.2d 754,

Overtrial is a doctrine developed in family law cases that may be invoked when one party's unreasonable approach to

litigation causes the other party to incur extra and unnecessary fees.... A party's approach to litigation is unreasonable if it results in unnecessary proceedings or unnecessarily protracted proceedings, together with attendant preparation time.

Here, the trial court noted it had previously found Steinke's allegations sufficient to show an arguable change of circumstances. Indeed, Rusch conceded at the attorney fees hearing that she was not claiming that the modification motion itself was frivolous in the sense of being unfounded in law. The court found Steinke had not engaged in protracted litigation over his motion by filing discovery requests or conducting depositions and had in fact withdrawn the motion when it became apparent he was unlikely to prevail. We agree with the trial court that the facts of this case do not demonstrate that Steinke overtried his motion or that the mere filing of the motion itself represented overtrial.

¶9 Rusch also objects to the trial court's determination that she herself overtried the issue of overtrial. Again, however, we are satisfied that the trial court's decision was supported by the record. The trial court emphasized that, despite its prior rulings limiting the scope of the attorney fees issue to fees incurred in defending the placement modification motion, Rusch failed to break down her request for fees either at the hearing or at her attorney's deposition. Instead she persisted in presenting claims for fees relating to other issues, unnecessarily increasing Steinke's time and expense in responding to her overtrial motion. The trial court was also reasonably persuaded that Rusch had no solid basis in law or fact for advancing her overtrial motion and continuing to resist Steinke's withdrawal of his placement modification motion with multiple reconsideration motions. Rusch does not dispute that Steinke reasonably incurred \$4800 in attorney fees after filing his motion to dismiss.

¶10 Finally, Krek asserts that the trial court had no legal basis to hold counsel responsible for paying a portion of Steinke's attorney fees. Once again, we disagree. It is well established that a trial court has inherent authority to sanction attorneys for misuse of the judicial process. *See, e.g., Teubel v. Prime Development, Inc.*, 2002 WI App 26, ¶16, 249 Wis. 2d 743, 641 N.W.2d 461. We see no reason why that inherent authority does not extend to apportioning an award of attorney fees in the overtrial context to an attorney who, as the record demonstrates, was in large part responsible for the overtrial.

*By the Court.*—Order affirmed.

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

