COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP22 **Cir. Ct. No. 2003FA700**

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

IN RE THE MARRIAGE OF:

SUSIE Y. CHON,

PETITIONER-APPELLANT,

V.

TIMOTHY J. SORENSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 ANDERSON, P.J. Susie Y. Chon appeals from a circuit court order denying her motion to reverse an order entered by the Kenosha county family court commissioner. Chon argues that the circuit court incorrectly denied her motion for a de novo hearing on the issues addressed by the family court commissioner's order. We conclude that the plain language of WIS. STAT. § 757.69(8) (2005-06)[1] entitles Chon to a new trial on both questions of fact and issues of law. Therefore, we reverse and remand with directions that the circuit court conduct a new trial on the issues presented by Chon.

¶2 Starting in 2006, the parties filed a series of motions and countermotions seeking to enforce various provisions of the divorce judgment and Chon also sought to have Timothy J. Sorenson found in contempt. In due course, a hearing was conducted before the family court commissioner. A mixed result came from the hearing, and Chon promptly filed a motion for a "de novo review of Family Court Commissioner James E. Fitzgerald's order to be entered following a hearing held before him on May 31, 2007. This motion is brought pursuant to § 767.69(8) Wis. Stats."

¶3 A hearing was held before the circuit court. After counsel for Chon outlined the three issues being presented for a de novo hearing, there was the following exchange:

> THE COURT: Here's the problem I got. I'm not criticizing your presentation but if the commissioner has made a ruling on what was presented in front of him, that's what I'm reviewing. And if you come into court and now tell me there's different facts, I can't review his decision 'cause those facts were never presented to the

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> commissioner. It's kind of like reviewing a preliminary hearing transcript. That's what a de novo is, what the court commissioner decided on the facts in front of him.
>
> MR. MACHULAK: Your honor, in our brief when we briefed the issue of what should be done at a de novo hearing, I think there is case law that suggests a de novo hearing is de novo review of evidence, that it should be undertaken by the Court.
>
> THE COURT: But that evidence was never presented to the commissioner.
>
> MR. MACHULAK: There was—there was more argument than evidence presented to the commissioner.

¶4 After hearing argument from Sorenson's attorney, the court commented:

> Thank you. Well, I—I've been doing a lot of de novos lately. I don't know if it's the court commissioner down there or it's me but I've been getting a lot of them and I basically have the same approach. If something comes up in front of me and it looks a little different than normal, then my ears perk up a little bit.

¶5 When the circuit court completed its oral decision, Chon's attorney asked, "Your Honor, may I make an offer of proof with my witness or is that being denied?" The court denied the request. Chon appeals.

¶6 On appeal, Chon faults the circuit court for refusing to hear testimony or accept exhibits. She contends that the hearing was conducted in a manner which violated the plain language of the statutes, WIS. STAT. §§ 767.17 and 757.69(8). Whether Chon is entitled to a new trial is a question of statutory interpretation.

> The interpretation and application of a statute to a set of facts is a question of law that we review de novo. We give statutory language its common, ordinary, and accepted meaning, except that technical or specially defined words or phrases are given their technical or special definitional meaning. We must construe a statute in the context in

> which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and reasonably, to avoid absurd or unreasonable results.

Donaldson v. Town of Spring Valley, 2008 WI App 61, ¶6, 311 Wis. 2d 223, 750 N.W.2d 506, *review denied*, 2008 WI 115, 310 Wis. 2d 708, 754 N.W.2d 851 (citations omitted).

¶7 Before getting to the meat of Chon's appeal, we must address Sorenson's assertion that we need not consider her argument because it is inadequately briefed. Relying on ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992), he maintains that Chon has failed to "develop any argument as to how and why the refusal by the trial court to hear her testimony or accept her exhibits would entitle her to any relief." We disagree. Chon's argument is that a hearing de novo, promised by WIS. STAT. § 757.69(8), is a new trial, and she explicitly requests a full evidentiary hearing before the circuit court after remand. It is obvious that if she was denied a statutory right, she would be entitled to relief in the form of a full evidentiary hearing.

¶8 Sorenson also faults Chon for not explaining "how her testimony or her exhibits would have led to a different conclusion." The problem with this argument is that Chon was not permitted to present evidence or an offer of proof and she cannot present argument to this court based on evidence not in the record and not considered by the circuit court. ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981) (assertions of fact that are not part of the record will not be considered).

¶9 Turning to the substantive issue, we begin by considering the two statutes in play:

> **767.17 Review of circuit court commissioner decisions.** A decision of a circuit court commissioner under this chapter is reviewable under s. 757.69(8).
>
> **757.69 Powers and duties of circuit court commissioners.** Any decision of a circuit court commissioner shall be reviewed by the judge of the branch of court to which the case has been assigned, upon motion of any party. Any determination, order, or ruling by a circuit court commissioner may be certified to the branch of court to which the case has been assigned, upon a motion of any party for a hearing de novo.

¶10 WISCONSIN STAT. § 767.17, at fifteen words, is clear and unambiguous: parties who do not prevail before the family court commissioner have the right to a review before the circuit court under the procedure outlined in WIS. STAT. § 757.69(8). Likewise, § 757.69(8) is clear and unambiguous: any party dissatisfied with any decision by a circuit court commissioner is entitled to a "hearing de novo."

¶11 We recently answered this same issue in ***Stuligross v. Stuligross***, 2009 WI App 25, No. 2008AP311:

> The plain meaning of WIS. STAT. § 757.69(8), specifically the phrase "hearing de novo," required the trial court to afford Stuligross an opportunity to present testimony at the hearing. The commonly accepted meaning of a *de novo* hearing is "[a] new hearing of a matter, conducted as if the original hearing had not taken place." BLACK'S LAW DICTIONARY 738 (8th ed. 2004). A *de novo* hearing requires a fresh look at the issues, including the taking of testimony (unless the parties enter into stipulations as to what the testimony would be). The hearing is literally a new hearing, not merely a review of whatever record may have been made before the family court commissioner.

Stuligross, 2009 WI App 25, ¶12.

¶12 Frankly, it should not come as a surprise to anyone that a hearing de novo is a new hearing.[2] In addition to ***Younglove v. City of Oak Creek Fire and Police Comm'n***, 218 Wis. 2d 133, 579 N.W.2d 294 (Ct. App. 1998), which we relied upon in ***Stuligross***, Wisconsin appellate courts have routinely ruled that a trial or hearing de novo is a new, fresh trial and not a review of the existing record. *See* ***Village of Menomonee Falls v. Michelson***, 104 Wis. 2d 137, 151, 311 N.W.2d 658 (Ct. App. 1981) (trial de novo is "a completely new trial as if no trial whatsoever had been had in the first instance, consistent with the general legal meaning of that term"); ***State ex rel. Murphy v. Voss***, 34 Wis. 2d 501, 507, 149 N.W.2d 595 (1967) ("Thus it is possible under the present laws to have a trial to the court or a trial to a six-man jury in the county court and a trial *de novo* either to the court or to a 12-man jury in the circuit court.").

¶13 Other jurisdictions have the same definition of trial or hearing de novo: ***Werths v. Director, Div. of Child Support Enforcement***, 95 S.W.3d 136, 142 (Mo. App. 2003) ("an original proceeding in front of the court and not a mere exercise of review jurisdiction"); ***Lamar County Appraisal Dist. v. Campbell Soup Co.***, 93 S.W.3d 642, 645 (Tex. App. 2002) ("[t]he phrase 'trial de novo' is generally defined as a new trial on the entire case, on both questions of fact and issues of law, conducted as if there had been no trial in the first instance"); ***Boehm v. Anne Arundel County***, 459 A.2d 590, 598 (Md. App. 1983) ("a trial or hearing 'de novo' means trying the matter anew the same as if it had not been heard before

[2] The Director of State Courts' Records Management Committee was not surprised that a new hearing was required; it drafted standard form FA-4130, Motion for and Notice of New (De Novo) Hearing, with a paragraph requesting a *new hearing on the following issues.* http://wicourts.gov/formdisplay/FA-4130.pdf?formNumber=FA-4130&formType=Form&formatId=2&language=en (last visited Feb. 3, 2009).

and as if no decision had been previously rendered"); ***State v. Rehborg***, 396 N.E.2d 953, 955 (Ind. App. 1979) ("[A] trial de novo is a trial from the beginning and is a trial had as if no action whatever had been instituted in the lower court."); ***Ball v. Jones***, 132 So.2d 120, 122 (Ala. 1961) ("A trial de novo, within the common acceptation of that term, means that the case shall be tried in the Circuit Court as if it had not been tried before, and that that court may substitute its own findings and judgment for that of the lower tribunal."); ***Pittsburgh S. S. Co. v. Brown***, 171 F.2d 175, 178 (7th Cir. 1948) ("a trial anew of the entire controversy, including the hearing of evidence, as though no previous action had been taken").

¶14 Chon requested a de novo review of the family court commissioner's order pursuant to WIS. STAT. § 757.69(8). She is entitled to be put back at "square one," as if the family court commissioner had not issued an order resolving the disputes between her and Sorenson. We reverse the trial court order and remand for a new trial on both questions of fact and issues of law.

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

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