COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2381 **Cir. Ct. No. 2002FA560**

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

IN RE THE MARRIAGE OF:

JANE ELLEN ROSKA, F/K/A JANE ELLEN KROLL,

JOINT-PETITIONER-RESPONDENT,

V.

RONALD LEE KROLL,

JOINT-PETITIONER-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Ronald Kroll appeals from a post-divorce order that denied his motion for contempt against his ex-wife, Jane Roska, and modified

the placement schedule for the parties' children. Roska asks us to declare the appeal frivolous and award her attorney fees. We affirm for the reasons explained below, but decline to impose sanctions.

BACKGROUND

¶2 Kroll and Roska were divorced in 2003. In 2007 the circuit court issued an order that granted Roska primary physical placement of the parties' two teenaged daughters and allowed her to move to Oregon with the girls on a temporary basis. The 2007 order granted Kroll limited periods of physical placement over school breaks, conditioned upon his continuing therapy for parenting issues.

¶3 In 2008 Kroll moved to have Roska held in contempt for refusing to allow him physical placement and for discussing court proceedings with the children. He also asked for monetary damages and a change of venue. Roska filed a counter-motion seeking modification of the placement schedule based upon Kroll's alleged failure to follow through with his therapy sessions.

¶4 At an evidentiary hearing, Roska testified that her residence in Oregon was temporary and that she still intended to permanently reside in Wisconsin. The children's counselor, Dr. Kip Zirkel, testified that one of the girls was suffering severe anxiety attacks and occasional panic episodes related to conflicts and experiences with her father, while the other girl was showing less severe symptoms of fear and anxiety, and neither girl wanted to be alone with their father. Zirkel testified that both girls described "walking on eggshells" around Kroll due to his unpredictable moods, citing one episode in which Kroll shot a BB gun at a telephone in front of them to show them the power of a gun, and other occasions where he had interrogated them over random things and would get upset

with their answers. Zirkel had met with the girls several times, most recently in person about a month before the hearing, but did not feel he could make a recommendation as to the permanent modification of placement because he had not interviewed Kroll. Zirkel believed that it would be beneficial to the children to heal their relationship with their father, and suggested that supervised day visits might be tried to evaluate the children's response.

¶5 Kroll testified at the hearing that he had suffered a head injury in a car accident in 2007, after which he had received psychological counseling. He denied receiving disability payments but acknowledged that he had not been employed since the accident, that he was on unspecified medications but had discontinued counseling, and that he had been arrested for theft and OWI since the last placement order.

¶6 The circuit court made factual findings that the children were afraid of their father due to his tone and demeanor following his head injury, which left him prone to ranting; that unsupervised visitation with Kroll would be traumatic for the children; and that the only way a trusting relationship could be reestablished between Kroll and the children would be through supervised visitation to give the children a feeling of security. The court denied Kroll's motions for a change of venue and to hold Roska in contempt, suspended the children's placement with Kroll under the 2007 order, and directed the guardian ad litem and court-appointed counselor to arrange a supervised placement schedule to be reviewed after ninety days. Kroll appeals each of those determinations.

DISCUSSION

¶7 The first issue Kroll raises is whether the circuit court erred in refusing to change the venue of the action. There is no question that the original divorce action was properly venued in La Crosse County, where both parties were then living. Kroll argues that the court should have changed the venue to Clark County, however, since Kroll had moved there and Roska was living in Oregon. Kroll cites WIS. STAT. § 822.28 (2007-08),[1] which is part of the Uniform Child Custody Jurisdiction and Enforcement Act, to support his position. Kroll's reliance upon that statute is misplaced, however, because no one was asserting that Oregon or any other state should take jurisdiction over the matter. Under the relevant statute for determining the proper county of venue within this state, a circuit court has discretion to change the venue of an action for the convenience of the parties or witnesses. WIS. STAT. § 801.52. Here, the court refused to change venue because Roska's counsel, the guardian ad litem, and the children's therapist were all located in La Crosse County. We are satisfied that the court's refusal to change venue was based upon proper factors and was well within its discretion.

¶8 The second issue Kroll raises is whether the circuit court erroneously exercised its discretion in denying his motion to find Roska in contempt. *See generally* ***City of Wis. Dells v. Dells Fireworks, Inc.***, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995) (setting forth discretionary standard of review). A court may impose sanctions for contempt upon a showing that a person has intentionally disobeyed a court order. *See* WIS. STAT. §§ 785.01(1)(b) and 785.02.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Kroll contends that Roska violated the 2007 placement order by failing to allow him to exercise his scheduled periods of placement and by discussing court proceedings with the children. Roska presented evidence, however, that Kroll had discontinued his counseling, which was a precondition for having placement. Therefore, Roska did not violate the court order by denying Kroll placement. Roska admitted that she had directed one of her daughters to tell Kroll to call Roska's attorney. The court did not directly address Kroll's argument that this was a violation of the 2007 placement order. However, we infer from the court's comment that it either did not consider Roska's action to constitute an actual discussion of court proceedings or that, if it were a discussion of court proceedings, it was not significant enough to warrant contempt sanctions. We are satisfied that either decision would be within the court's discretion.

¶9 Kroll's third complaint is that the guardian ad litem was "so far removed from the children that his input was rendered useless." This complaint appears to be based upon the premise that the guardian ad litem had not met with the children in two years. However, since the guardian ad litem questioned witnesses rather than testifying at the hearing, we do not have any factual basis to determine when he last met with the children. In any event, Kroll does not specify what "input" from the guardian ad litem he is challenging. It appears that the guardian ad litem's largest contribution at the evidentiary hearing was to elicit testimony from the children's counselor that it would be beneficial to the children to heal their relationship with their father, and that might best be achieved through supervised placements. The counselor had last seen the children in person a month before the hearing, and had also spoken with them by phone while they were in Oregon. It was the guardian ad litem's job to bring the counselor's

opinion to the court's attention, and Kroll has not identified any legal error in his doing so.

¶10 Kroll's fourth complaint is that the circuit court failed to consider all of the relevant facts, including information provided in the affidavits accompanying the parties' motions. However, the circuit court was required to base its decision only upon the evidence produced at the hearing. Any material attached to prior motions was not itself evidence and not properly before the court. Rather, it was the responsibility of each party to elicit testimony or produce exhibits at the hearing to support whatever assertions they had previously made in their affidavits. The circuit court did not err in failing to consider any facts that were not introduced into evidence at the hearing.

¶11 Kroll's fifth claim is that the circuit court erred in failing to "filter hearsay, unfounded opinions, and speculations" about him that were testified to at the hearing. Kroll has not indentified any specific evidentiary ruling that he is challenging, but seems to suggest that the trial court should have considered some information produced at the hearing to have been "incomplete and inaccurate." To the extent that Kroll is trying to assert that testimony by one or more of the witnesses was unreliable and/or fraudulent, we note that credibility determinations by a circuit court acting as the fact-finder are not reviewable by this court. ***State v. Oswald***, 2000 WI App 3, ¶47, 232 Wis. 2d 103, 606 N.W.2d 238. Simply put, the circuit court was in the best position to evaluate the truthfulness and reliability of testimony provided at the hearing, and we will not set aside its decision as to what weight to give to particular testimony.

¶12 Finally, Kroll asks this court to order a prosecution for perjury and/or parental interference. We have no authority to initiate any such criminal proceedings.

¶13 We turn next to Roska's motion for attorney fees. WISCONSIN STAT. RULE 809.25 authorizes this court to award attorney fees upon determining that an appeal is frivolous, either because it was commenced in bad faith for the purpose of harassment, or because the party or the party's attorney knew or should have known that the action or defense lacked any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. However, we will award attorney fees only when we deem an appeal frivolous in its entirety. ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, ¶54, 264 Wis. 2d 318, 667 N.W.2d 14. We agree with Roska that many of Kroll's appellate issues are frivolous, including his arguments regarding venue, participation in the proceedings by the guardian ad litem appointed by the court, and the court's reliance upon testimony by the children's counselor. However, we are persuaded that it was not frivolous to challenge the court's failure to explicitly address Kroll's argument that Roska had discussed court proceedings with the children in violation of a court order before refusing to find Roska in contempt. We therefore decline to find that the appeal was frivolous in its entirety and deny Roska's motion for attorney fees on appeal.

By the Court.—Order affirmed.

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