COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2010

David R. Schanker
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. 2009AP2739 **Cir. Ct. No. 2007FA181**

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

IN RE THE MARRIAGE OF:

JEFFREY M. OLSEN,

PETITIONER-RESPONDENT,

V.

VICTORIA L. OLSEN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Victoria Olsen appeals the custody and placement components of the judgment divorcing her from Jeffrey Olsen. She specifically

challenges two evidentiary decisions that precluded certain evidence of alleged domestic violence by Jeffrey from being admitted or considered by the court. She further argues that the refusal to consider her evidence improperly relieved the court of having to determine which party was the primary physical aggressor under WIS. STAT. § 767.41(2)(d)2. (2007-08)[1] for the purpose of applying a presumption against awarding custody to a parent who has engaged in domestic violence. We conclude that there was no reversible error for the following reasons.

¶2 The first decision Victoria challenges is the circuit court's refusal to make a factual finding that Jeffrey had typed and/or signed a letter in which he apologized for past abusive behavior, including sexually assaulting Victoria and lying to authorities about abuse allegations he made against her. We note that this decision was not an actual legal ruling excluding the letter from evidence.[2] Rather, the court was merely explaining that it would not give any weight to the letter based on its assessment of the low credibility of both parties' testimony about the letter and the lack of any third party corroboration of the events described therein.

¶3 Because the circuit court is in the best position to observe witness demeanor and gauge the persuasiveness of testimony, it is the "ultimate arbiter" for credibility determinations. ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). For the same reason, we also defer to the circuit court's

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

[2] The exhibit list shows the letter was received into evidence, although neither party directs our attention to the point in the proceeding where it was offered and accepted.

resolution of discrepancies or disputes in the testimony, and its determination of what weight to give to particular testimony. *See* ***id.*** A circuit court can properly reject even uncontroverted testimony if it finds the facts underpinning the testimony to be untrue or not credible. ***State v. Kimbrough***, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. Therefore, we will not disturb the circuit court's determination here that there was insufficient credible testimony to establish that Jeffrey had typed and/or signed the written letter and the court's corresponding decision to give no evidentiary weight to the letter. Victoria essentially asks us to reweigh the evidence—something we may not do.

¶4 The second decision Victoria challenges is the circuit court's ruling that Victoria's former attorney, Kurtis Berg, could not testify about an event he personally witnessed during a transfer of placement unless Victoria waived her entire attorney/client privilege. We question in the first instance whether testimony about events personally observed by an attorney fall within the privilege for a client's communications to an attorney. However, rather than discuss that point or determine whether a full or partial waiver was required here, we will simply assume for the sake of argument that the attorney should have been allowed to testify about his observations.

¶5 According to a letter attached to Victoria's motion in limine,[3] the attorney observed Jeffrey put his truck in reverse in a parking lot while the parties' son Matt was behind the truck. Jeffrey smiled at Victoria and kept backing up

[3] Victoria refers to the attorney's letter as Exhibit 23. We do not see that letter included in the exhibit packet in the appellate record. However, we will accept the submission of the letter in a pretrial motion in limine as a sufficient offer of proof for the purpose of this appeal.

while she put up her hand in a stop gesture. This appeared to the attorney to be a juvenile game, designed "to intimidate or otherwise irritate" Victoria.

¶6 Victoria argues that this incident should be deemed to constitute domestic abuse in the form of a threat to harm the child, sufficient to trigger a presumption against custody by the abusive parent under WIS. STAT. § 767.41(2)(d)1. Since the court found that Victoria herself had committed domestic violence by hitting Jeffrey on one occasion documented by a police report, the court would then have been required to determine which parent was "the primary physical aggressor" before assigning the presumption against either parent. WIS. STAT. § 767.41(2)(d)2.

¶7 Jeffrey contends that the absence of the attorney's testimony was at most harmless error because Victoria herself testified about the same incident. We note, however, that the circuit court specifically stated that it was disregarding both parties' testimony about any events that were not corroborated by a third party. Therefore, we are not persuaded that the attorney's testimony would have been merely cumulative. Nonetheless, we conclude that the attorney's testimony would not have affected the outcome of the appeal.

¶8 First, we do not see how Jeffrey could have been deemed the "primary physical aggressor" in terms of domestic abuse based on an incident in which he engaged in an inappropriate "game" that included no physical contact, as opposed to an actual physical battery committed by Victoria that had been documented by police. Moreover, the circuit court explained that it was placing heavy emphasis on the expertise of Dr. Michael Nelson, who performed the custody evaluation, as well as the opinion of the guardian ad litem, who both recommended that Jeffrey have sole custody and primary physical placement. We

see no reasonable probability that additional testimony about the parking lot incident would have caused the court to deviate from those recommendations. We therefore conclude that the exclusion of the attorney's testimony was at most harmless error.

By the Court.—Judgment affirmed.

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