COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP952 **Cir. Ct. No. 2015PA305**

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

IN RE THE PATERNITY OF J. W. O. T.:

R. B. O., J. W. T., A. C. AND J. M. C.,

JOINT-PETITIONERS-APPELLANTS,

V.

MARK S. KNUTSON, GUARDIAN AD LITEM FOR J. W. O. T.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: PETER C. ANDERSON, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, Sherman, and Blanchard, JJ.

¶1 PER CURIAM. The underlying action in this appeal was commenced with the filing of a petition for a determination of parentage in

connection with the birth of a child by a surrogate mother, after the pertinent persons entered into a surrogacy agreement. The circuit court granted the uncontested petition. However, the only dispute on appeal is over the amount of compensation to which the guardian ad litem is entitled. Moreover, we resolve this appeal on limited grounds: reversal due to the failure of the circuit court to address a motion for reconsideration regarding reasonable GAL compensation. Neither side urges reversal on this ground, but we conclude that it is compelled by settled law and the distinctly different roles of the circuit courts and this court. Separately, in the interest of judicial efficiency, we resolve legal issues briefed by the parties that are likely to recur following remand.

BACKGROUND

¶2 Although the underlying family law case has a long history, only a fraction of the background is pertinent to the issues we resolve on appeal. The following facts are undisputed, unless otherwise noted.

The Nature Of The Underlying Action

¶3 A same-sex married couple living in Virginia and an opposite-sex married couple living in Wisconsin jointly commenced this action with a petition in Dane County circuit court for a determination of parentage of a child then carried in utero by the Wisconsin woman, as a surrogate mother for the Virginia couple. *See* WIS. STAT. §§ 69.14(1)(h) and 767.80 (2015-16).[1] We will refer to

[1] The details do not matter to any issue we resolve, but for context, WIS. STAT. § 69.14(1)(h) (2015-16) addresses children born to a surrogate mother. Pursuant to § 69.14(1)(h), the state registrar, an officer located within the state Department of Health Services, is to initially list only the surrogate mother and not a father on the birth certificate pending a determination of parentage by a circuit court. Upon receipt of the determination of parentage, the registrar is to (continued)

the Virginia and Wisconsin couples collectively as the petitioners. Under the terms of a surrogacy agreement signed by each petitioner, the Virginia couple ("the intended parents") were the child's intended parents, and the Wisconsin woman was the gestational surrogate. The petition sought a declaration that the intended parents are the child's lawful parents and an order directing that the state registrar amend the child's birth certificate to reflect the parentage determination made by the court.

Judge O'Brien's Interim Order

¶4 The initial judge assigned to the case, the Hon. Sarah B. O'Brien, received a brief in support of the petition and held an evidentiary hearing. Judge O'Brien then issued an interim order determining that the Virginia couple was the child's "intended parents," as specified in the surrogacy agreement, and that the surrogate mother and her husband had not contributed gametes (*i.e.*, reproductive cells) to conceive the child and were not otherwise the child's biological or legal parents. Judge O'Brien concluded that she had the authority to enforce the agreement and to determine parentage pursuant to ***Rosecky v. Schissel***, 2013 WI 66, 349 Wis. 2d 84, 833 N.W.2d 634 (surrogacy agreements are valid contracts and enforceable if consistent with child's best interests). Judge O'Brien further determined that "[i]t is in [the child']s best interest that [the intended parents] both have parental rights to" the child. The interim order stated that Judge O'Brien

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issue a replacement birth certificate that reflects the court's parentage determination. WISCONSIN STAT. § 767.80 sets forth the governing procedures for determination of paternity.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

would enter a final order, a draft of which was attached to the interim order, upon notification of the child's birth.

Decisions By Judge Troupis

¶5 Before the child's birth, and thus before entry of Judge O'Brien's draft final order, the case was re-assigned to the Hon. James R. Troupis. Judge Troupis suggested the appointment of a GAL, and the petitioners did not object, indicating that it was their shared understanding that the GAL would "talk to" the intended parents and to the surrogate mother, and make a best interests recommendation to the court. Judge Troupis said that he expected that the GAL would follow the "standard process" of conducting an inquiry and making a recommendation to the court, which might or might not result in the need for another hearing in the case.

¶6 Judge Troupis selected and appointed Attorney Mark Knutson as GAL, "to be paid privately," that is, by the intended parents rather than the taxpayers, "at the standard terms and rate charged by Attorney Knutson," in other words, at a market rate instead of at the statutory rate of $70 per hour.[2] *See* SCR 81.02(1). The intended parents did not object to being assigned responsibility for paying Knutson's reasonable GAL compensation.

¶7 Judge Troupis suspended the portion of Judge O'Brien's interim order stating that the draft final order would be issued upon the child's birth. Judge Troupis explained that, before he decided whether to issue the draft final

[2] Knutson would end up submitting requests for compensation at a rate of $325 per hour for himself and at a rate of $225 per hour for an associate attorney in his law firm.

order, he wanted to hear from Knutson, who would likely not have enough time to submit a report before the child's birth.

¶8 From the start, and throughout the proceedings, the underlying family court matter was uncontested. Nevertheless, Knutson declined to conduct interviews with the petitioners unless they were represented by attorneys who were present. And, rather than simply conduct interviews, Knutson insisted on depositions and deposed all four petitioners. In addition, Knutson noticed the deposition of the coordinator of the clinic that facilitated the surrogacy agreement and arrangements. After Judge Troupis denied the coordinator's motion to quash and the petitioners' motion for a protective order, Knutson deposed the coordinator.

¶9 The petitioners filed a notice of voluntary dismissal of the action on the day after the child's birth. Knutson opposed dismissal. Judge Troupis denied dismissal.

¶10 Twice within a month after the child's birth, the petitioners asked Judge Troupis to set a deadline for Knutson's submission of his best interests recommendation. Knutson objected, taking the position that the court should first decide other issues. The court declined the requests to set a deadline for Knutson's recommendation. About three months after the child's birth, Knutson filed his best interests recommendation. Knutson wrote that it was in the child's best interests for the intended parents to become the child's legal parents. But Knutson went beyond the issue of who should be the child's parents and addressed a topic not contemplated by the petitioners when they did not object to Judge Troupis's sua sponte suggestion of the appointment of a GAL. Knutson expressed the opinion that the only lawful way for the intended parents to become the child's

legal parents was through adoption, rather than through a determination of parentage under WIS. STAT. § 69.14.

¶11 In the course of the proceedings, Knutson submitted to the court seven bills totaling over $100,000 to compensate him for GAL fees and costs. The intended parents filed an objection to each submission, following the procedures outlined by Dane County local Rule 409.[3] Six of the seven bills, totaling approximately $90,000, are the subject of this appeal. The intended parents made the following objections: much of the work for which Knutson sought compensation had nothing to do with advancing the child's best interests because the work resulted in positions Knutson took in his report to the court that did not support his conclusion that it was in the child's best interests to have the intended parents as his parents, such as Knutson's position that an adoption was required; Knutson's total requested compensation was unreasonable because GALs in uncontested actions involving parental rights customarily charge a total of between $300 and $1,500; Knutson is not entitled to compensation for time and expenses relating to depositions that he did not need to take; Wisconsin statutes do not permit Knutson to charge for the services of additional lawyers assisting him as the GAL, and he charged for the work of an associate; the work of the particular associate at issue should not be compensated because the associate's published

[3] On appeal, Knutson argues that the petitioners are either estopped from asserting, or forfeited their right to assert, objections to the amount of Knutson's compensation because they did not raise the objections until after Knutson had performed a substantial amount of work. We reject this argument. The petitioners argue, without contradiction by Knutson, that they followed the Dane County local rules in filing timely objections to the fee requests as Knutson submitted them, and that they had no different or earlier-in-time avenue to object to fees under the local rules. In sum, Knutson does not demonstrate that the petitioners are estopped from raising, or have forfeited, their objections to Knutson's compensation in connection with their motion for reconsideration.

writing had demonstrated hostility towards same-sex families; and, Knutson is not entitled to compensation for his work defending his compensation requests against objections.

¶12 By way of background, we note that a circuit court may exercise its discretion to consider a broad range of factors in determining whether a GAL compensation request is reasonable. *See* ***Estate of Trotalli***, 123 Wis. 2d 340, 354-55, 366 N.W.2d 879 (1985) (explaining that pertinent factors include "the tasks necessary to perform the legal service properly," "the time, labor and skill required to perform the tasks properly and the difficulty or novelty of the issues involved," "the importance and character of the litigation," "the amount of money or property affected," and "the time limitations imposed by the client or the circumstances."); *see also*, ***Bialk v. Milwaukee Cty.***, 180 Wis. 2d 374, 382, 509 N.W.2d 334 (Ct. App. 1993) (listing same factors and including several others, which include, as potentially pertinent here, customary fee payments and customary fee awards in similar cases).

¶13 In a series of oral rulings and written orders, Judge Troupis determined that Knutson's compensation requests were reasonable and denied the petitioners' objections and requests to reduce Knutson's compensation. Judge Troupis determined that "the costs here are not ... even anywhere near a number I would think was unreasonable in total, compared to ... what's at stake, which is the life of a child." Of the bills that are subject to this appeal, the circuit court approved each in its entirety, with the exception of a $35.19 interest charge that Knutson acknowledged was not proper.

¶14 On March 25, 2016, approximately seven months after the child's birth, Judge Troupis entered a final decision and order on the joint petition. While

Judge Troupis determined that it was in the child's best interests for the intended parents to be the child's parents, the March 25 order adopted Knutson's view that the circuit court was without authority to make a determination of parentage and adopted anti-commercial-surrogacy public-policy positions that Knutson had set forth in his best interests recommendation, under which an adoption proceeding was necessary. The March 25 order denied all the relief requested in the joint petition. The order terminated the parental rights of the surrogate mother and her husband, even though that had not been requested by the petitioners or the GAL. Finally, the order kept in place an earlier "Temporary Order for Custody and Placement," which temporarily placed the child with the intended parents.

¶15 Pertinent to this appeal, the petitioners filed a motion to reopen and reconsider the March 25, 2016 order and the orders regarding GAL compensation, under WIS. STAT. §§ 806.07(1)(d) and (h) and WIS. STAT. § 805.17(3).[4]

Judge Anderson's Response To Motion For Reconsideration

¶16 While the motions to reopen and reconsider were pending, Judge Troupis retired, and this case was assigned to the Hon. Peter C. Anderson. Judge Anderson held a hearing on June 3, 2016, at which he made oral rulings that were subsequently memorialized in orders dated June 7 and June 22, and a final, appealable order dated July 20, 2016. Judge Anderson granted the reconsideration

[4] WISCONSIN STATS. § 806.07(1)(d) permits a court to reopen and reconsider "a judgment, order or stipulation" if the judgment is void. Subsection (1)(h) further permits a court to reopen and reconsider a judgment or order for "[a]ny other reason justifying relief" from the judgment or order.

WISCONSIN STATS. § 805.17(3), entitled "reconsideration motions," permits a court, upon timely filing after the entry of a judgment, to "amend its findings or conclusions or make additional findings or conclusions" and to "amend the judgment accordingly."

motion in part by vacating in its entirety Judge Troupis' March 25 order. In its place, Judge Anderson issued a parentage order as originally contemplated by Judge O'Brien. Judge Anderson declared that the intended parents are the parents of the child and granted the petitioners' request to amend the child's birth certificate to reflect that parentage.[5] Judge Anderson's parentage-related decisions are not challenged by either side in this appeal.

¶17 Regarding the challenged GAL compensation, however, Judge Anderson did not take a clear path, as we now explain. Judge Anderson discharged Knutson as GAL, and made observations that, if put forth as findings, might have accompanied an order granting a reduction in Knutson's requested compensation. Although he did not state that he thought that any particular amount of the compensation awarded by Judge Troupis was unreasonable or unnecessary, Judge Anderson expressed the view that the proceedings had been "over litigated" and "extremely expensive." Judge Anderson further opined that "the amount of time and effort that has gone into arguing a very straightforward question"—namely, the question of whether the petition for the declaration of parentage should be granted—was "odd," and that he could not "figure out why it took this many months, this much money, this many pages of briefs to debate the question of whether a parentage agreement is enforceable if it is not contrary to the best interests of the child." Judge Anderson appeared to express the view that Knutson attempted to act as an advocate for positions that Knutson believed were

[5] To clarify the orders at issue, in the order dated June 7, 2016, Judge Anderson vacated Judge Troupis's March 25 order in its entirety, but was silent on the GAL compensation issue. Judge Anderson included in the June 22 and July 20 orders additional language that has the apparent effect of leaving in place Judge Troupis's orders regarding compensation, and the petitioners do not argue to the contrary.

held by Judge Troupis, rather than solely advancing the interests of the child. Specifically, Judge Anderson opined that Knutson had been "more a friend of the Court [Judge Troupis,] perhaps on positions the Court [Judge Troupis] already had views on[,] as opposed to a guardian ad litem."

¶18 At the same time, Judge Anderson effectively declined to address the merits of the petitioners' challenge to Knutson's compensation requests, saying the following:

> I am not going to hear the [reconsideration] motion with respect to guardian ad litem fees. What I'm going to do is deny [the reconsideration motion]. I'm not a Court of Appeals. That's an appeals issue…. [A]ll the ins and outs of what did Judge Troupis ask and all sorts of stuff [are matters] that I don't think [are] appropriate for a motion for reconsideration or a motion for relief from the judgment.

We interpret Judge Anderson to have denied the motion based on his conclusion that he lacked the authority to address the merits of the motion to revisit the GAL compensation issues previously resolved by Judge Troupis, and that instead any challenge to Judge Troupis's GAL compensation decisions must be considered in the first instance by this court.

DISCUSSION

¶19 On appeal, the petitioners ask us to address the same objections to Knutson's GAL compensation requests that they raised before Judge Troupis and again, in the reconsideration motion, before Judge Anderson, which are summarized above at ¶11.[6] Knutson responds with counterarguments on the same

[6] The intended parents have filed briefs in support of their appeal. The surrogate mother and her husband have not filed briefs, but have indicated by letter that they join the intended parents in this appeal and rely on their briefing.

topic. Neither side mentions the question of whether Judge Anderson was correct in taking the position that he lacked authority to consider the motion for reconsideration of Judge Troupis's GAL compensation decisions. However, as we now explain, Judge Anderson incorrectly took the position that he lacked authority to address a motion to revisit matters previously resolved by Judge Troupis. Indeed, this court is not authorized to address a reconsideration motion in the first instance.

¶20 A successor judge "may in the exercise of due care modify or reverse decisions, judgments or rulings of his [or her] predecessor if this does not require a weighing of testimony given before the predecessor and so long as the predecessor would have been empowered to make such modifications," because "the power to modify a judicial ruling resides in the court and not in the person of the individual judge, who is merely the personification of the powers of the court." ***Starke v. Village of Pewaukee***, 85 Wis. 2d 272, 283, 270 N.W.2d 219 (1978). Our review of the record does not disclose disputed testimony before Judge Troupis bearing on the issue of the reasonableness of Knutson's GAL compensation. More to the point, we do not discern that Judge Troupis weighed testimony on this issue.

¶21 Moreover, determinations regarding the reasonableness of professional fees and costs involve fact finding, which is a task delegated to circuit courts, not to appellate courts. *See* ***Bernier v. Bernier***, 2006 WI App 2, ¶23, 288 Wis. 2d 743, 709 N.W.2d 453 (Ct. App. 2005) (citing ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 575, 597 N.W.2d 744 (1999)) (circuit courts are in an "advantageous position in determining the reasonableness of" attorney fees). Our role in this context is limited to reviewing circuit court decisions for erroneous exercises of discretion. *See* ***State v. Abbott Laboratories***, 2013 WI App 31, 346

Wis. 2d 565, 829 N.W.2d 753 ("If the trial court misapplied the law regarding attorney fees ..., that would be an erroneous exercise of discretion.") (citation omitted); *see also* ***Johnson v. Roma II-Waterford, LLC***, 2013 WI App 38, ¶¶16, 37, 346 Wis. 2d 612, 829 N.W.2d 538 (citations omitted) (determination of reasonable amount of attorney's fees requires an exercise of the circuit court's discretion, and we are not in a position "to exercise the circuit court's discretion for it").

¶22 As noted above, WIS. STAT. § 806.07 permits a circuit court to reopen and reconsider an earlier decision, including the possibility of entertaining additional evidence. In particular, WIS. STAT. § 806.07(1)(h) provides that a court may amend a judgment or order for "[a]ny other reasons [that] justif[y] relief" from the judgment or order. *See* ***Conrad v. Conrad***, 92 Wis. 2d 407, 418, 284 N.W.2d 674 (1979) (sub. (1)(h) "must be liberally construed to allow relief from judgments" whenever "'appropriate to accomplish justice'") (quoted source omitted); *see also* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853 (party seeking to prevail on motion for reconsideration must present newly discovered evidence or establish a manifest error of law or fact).

¶23 Based on these standards, we conclude that Judge Anderson committed legal error when he declined to consider the merits of the reconsideration motion on the GAL compensation requests issue based on his belief that he lacked authority to address the motion. For this reason, we remand the matter to the circuit court to address, for the first time, the motion to reconsider Judge Troupis's determination as to a reasonable amount of GAL compensation requests.

¶24 We could end at this point. However, in the interests of judicial efficiency, we offer guidance on two sets of discrete legal issues raised by the parties, given the possibility that the court following remand will have occasion to address these legal issues briefed by the parties: (1) whether a circuit court is precluded under WIS. STAT. § 767.407(6) from awarding compensation for work performed by attorneys other than the appointed GAL; and (2) whether a circuit court is precluded from awarding a GAL compensation for time spent defending against objections to the reasonableness of compensation requests. We acknowledge that there are other legal issues that the parties have discussed in their briefing, including the petitioner's seeming assertion that GAL Knutson should not be compensated for time challenging the legal efficacy of the proposed parental rights order, under WIS. STAT. § 69.14, because, according to the petitioners, the challenge was "bizarre." The absence of discussion in this opinion on any issue should not be interpreted as implicitly expressing an opinion on that issue.

Compensation For Work Performed By The Associate

¶25 The petitioners argue that, as a matter of statutory interpretation, Knutson cannot recover compensation for fees and costs incurred by an associate in Knutson's law firm whom Knutson represented had assisted him with Knutson's GAL duties, because the associate was not the GAL, was not an expert, and was not approved by the court for compensation in advance. Petitioners cite to the following statutory language addressing compensation to GALs which provides, in pertinent part:

> COMPENSATION. The guardian ad litem shall be compensated at a rate that the court determines is reasonable. The court shall order either or both parties to pay all or any part of the compensation of the guardian ad

> litem. In addition, upon motion by the guardian ad litem, the court shall order either or both parties to pay the fee for an expert witness used by the guardian ad litem, if the guardian ad litem shows that the use of the expert is necessary to assist the guardian ad litem in performing his or her functions or duties under this chapter.

WIS. STAT. § 767.407(6).

¶26 Petitioners argue that the following three features of WIS. STAT. § 767.407(6) support the conclusion that Knutson is not entitled to any compensation as a GAL for work done by the associate, regardless of the nature or circumstances of the associate's work in assisting the GAL: (1) the statutory language contemplates the appointment of a single attorney as GAL ("*The* guardian ad litem"); (2) the statute specifically allows for a GAL to seek compensation to hire individuals to assist the GAL, namely experts, but does not include a provision for the GAL to seek compensation for the services of other attorneys; and (3) the statute requires the court to approve the GAL's rate, and Judge Troupis's order appointing Knutson GAL did not reference compensation for any associate, or for Knutson's law office.

¶27 We are not persuaded by the petitioners' argument, which is based entirely on this statutory language, that a court is precluded from approving GAL compensation for the cost of assistance provided by an attorney other than the GAL. The compensation provision does not appear to contemplate, either way, the use of an assisting attorney; it is silent on the topic. In the absence of statutory language on the topic, we see no reason to interpret the statute as the petitioners propose. Therefore, the determination as to whether the work of an associate is compensable in the GAL context is a question to be determined on a case-by-case basis, applying the ***Trotalli*** analysis.

¶28 We emphasize that we intend to reject only the limited statutory interpretation argument that the petitioners make. The question of whether the work of the associate here is compensable as part of the compensation requests made by Knutson is simply one potential issue that the circuit court may address following remand in considering the motion for reconsideration. In other words, on remand, the circuit court may consider whether, under the circumstances presented in this case, it was reasonable for Knutson to enlist the services of another attorney and, if so, whether all, or only some, of the associate's work should be compensated.

Compensation For Defending Against Objections To Compensation Requests

¶29 Separately, we address the legal rules involving petitioners' objections to Knutson's request for compensation for efforts Knutson made in defending his requests for compensation. We address two arguments that the petitioners make on this compensation-for-defending-compensation topic.

¶30 First, the petitioners argue that Knutson is not entitled to any compensation here because, under the rule stated in ***Trotalli***, a GAL may recover compensation only for efforts in defending against *unreasonable* objections to compensation requests. The petitioners argue that none of their objections were unreasonable. We do not address the substance of this argument, because it is for the circuit court in the first instance to determine whether objections are reasonable. However, we do confirm the petitioners' view of the legal rule involved. The applicable rule is plainly stated in ***Trotalli***: "the guardian ad litem is entitled to compensation for the time and effort he was obligated to spend in meeting the opposition ... to the fee, *to the extent that the opposition was unreasonable*." 123 Wis. 2d 340, 361 (emphasis added). Knutson's contrary

interpretation of ***Trotalli*** is simultaneously difficult to summarize and plainly incorrect. It is sufficient to say that Knutson's interpretation would have the effect of rendering null the fees language we quote from ***Trotalli***.

¶31 Second, the petitioners argue that this court should adopt a standard under which GALs who are compensated at market rates are not entitled to recover compensation for any time spent responding to fee objections, or perhaps that such GALs are entitled only to compensation at a lower rate. The petitioners first argue that a market-rate-compensated GAL is never entitled to any compensation in connection with disputes over compensation, but then offer an alternative, undeveloped argument that he or she would be entitled only to the statutory rate in connection with disputes over compensation. *See* SCR 81.02(1) (establishing statutory rate for GALs, which is currently $70 per hour).[7]

¶32 While Knutson has little to say on the topic of an automatic rule that would apply to market-rate GALs who seek compensation in connection with compensation disputes, we see no basis in statutory or case law or, for that matter, in logic to adopt any such automatic rule. As we have just explained, compensation is due only for efforts responding to "unreasonable" objections. We see no basis for a rule of automatic denial of all compensation for efforts responding to unreasonable objections, or automatic reduction to the statutory rate, simply because a GAL has been approved at a market rate.

[7] We note that across the petitioners' arguments on appeal it is often difficult to tell whether they are arguing that Knutson is entitled to zero compensation or instead for some particular reduction in the compensation awarded by Judge Troupis, and if so, a reduction of what amount.

¶33 In closing, we emphasize the following. We do not disturb any ruling of Judge Anderson other than his decision not to address the merits of the reconsideration motion regarding GAL compensation. Further, we do not intend to direct the circuit court regarding the manner in which it addresses the reconsideration motion regarding GAL compensation. For example, we leave it to the circuit court's discretion going forward to determine whether to allow additional evidence, and if so what kind of evidence, or to request any form of additional briefing by the parties, or whether the record as it currently exists provides a sufficient basis for the court to rule on the reconsideration issue under applicable standards referenced above. And, aside from the legal issues we have addressed in the interest of judicial efficiency, we do not intend to direct the court regarding the substance of any decision it makes on the reconsideration issue.

CONCLUSION

¶34 For the foregoing reasons, we reverse and remand for further proceedings consistent with this opinion.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).