COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP414 **Cir. Ct. No. 2008FA7027**

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

IN RE THE MARRIAGE OF:

HERBERT RAYMOND GLIDEWELL,

PETITIONER-RESPONDENT,

V.

JILL IRENE RILEY, F/K/A JILL IRENE GILDEWELL,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Reversed and cause remanded.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Jill Irene Riley (f/k/a Jill Irene Glidewell) appeals the order dismissing, on the merits, her motion for review of the family court commissioner's decision denying her request to modify child custody and placement. The sole issue on appeal is whether in conducting its review, the circuit court held a hearing *de novo* as required by WIS. STAT. § 757.69(8) (2015-16).[1] We conclude that it did not. Accordingly, we reverse and remand so that the circuit court can afford Riley the hearing to which she is statutorily entitled.

I. BACKGROUND

¶2 This is not the first time these parties have been before this court. *See* ***Glidewell v. Glidewell***, 2015 WI App 64, 364 Wis. 2d 588, 869 N.W.2d 796. The history of this case need not be repeated here. It suffices to state that Riley previously appealed from a postjudgment custody order continuing joint custody of her two minor children with her former husband Herbert Glidewell but allocating certain decision-making to each party. *See* ***id.***, ¶1. Specifically, Riley has final decision-making authority in the event of a dispute regarding medical care for the children and Glidewell has final decision-making authority in the event of a dispute regarding educational decisions for the children. *See* ***id.***, ¶11. We affirmed the order, *see* ***id.***, ¶4, and the Wisconsin Supreme Court denied Riley's petition for review.

¶3 Two months after her petition for review was denied, Riley filed the motion to modify custody and placement underlying this appeal. She alleged that the children's current custody and placement schedule was harmful to them. Her

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

allegations stemmed from Glidewell's decision to move the children from the Oconomowoc school district to a Milwaukee public school. The family court commissioner who presided over the hearing dismissed Riley's motion.

¶4 Riley then filed a motion for *de novo* review of the family court commissioner's decision by the circuit court. Glidewell and the guardian *ad litem* (GAL) moved to dismiss Riley's motion arguing that there had not been a substantial change in circumstances to warrant modifying the custody order. *See* WIS. STAT. § 767.451(1)(b)1.a.-b. (setting forth the standards that apply when seeking to substantially modify legal custody and physical placement orders).[2] Riley responded arguing that WIS. STAT. § 767.17 clearly and unambiguously provided that she had the right to review by the circuit court under the procedure set forth in WIS. STAT. § 757.69(8). If the circuit court did otherwise, she asserted that it would be akin to a summary judgment proceeding.

[2] For purposes of her motion, the GAL assumed the applicable standard was that found in WIS. STAT. § 767.451(1)(b), which provides for modification of custody or placement orders after the initial two-year period as follows:

> 1. … [U]pon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement … if the court finds all of the following:
>
> a. The modification is in the best interest of the child.
>
> b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

¶5 Following the GAL's filing of her motion to dismiss, the court trial date was converted to a final pretrial.[3] At the pretrial, the circuit court set a briefing schedule for the pending motions to dismiss and scheduled a hearing date.

¶6 On the date of the hearing, Riley was excused from appearing due to a death in her family. In making its remarks at the hearing, the circuit court noted the unique circumstances presented: namely, that the GAL, who represented the best interests of the children, had moved to dismiss Riley's motion for *de novo* review because there was not a substantial change of circumstances. The GAL explained to the circuit court that she had met with the children's teachers and the school psychologist, in addition to reviewing all of their school transcripts. The GAL relayed to the circuit court that the educators indicated the children were thriving academically and socially in their current school. The GAL argued that continued litigation denied the children financial and emotional resources from their parents.

¶7 Riley's attorney responded and explained the purpose behind the motion for *de novo* review:

> I think, first of all, the nexus of the motion [for *de novo* review] isn't so much that the school isn't the greatest or it's not a quality school or they're [i.e., the children are] not going to get a quality education.
>
> That's not necessarily what the point of the motion is.
>
> The point of the motion is that there are two separate doctors [who] have been brought in to treat the

[3] We take judicial notice of CCAP records. CCAP is an acronym for Wisconsin's Consolidated Court Automation Programs. The online website reflects information entered by court staff. *See* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

> kids, not for further litigation purposes, but to treat the kids, and both [doctors] were compelled throughout their treatment of both children to come forward and say they'd be willing to help in these proceedings to modify this arrangement because they don't see it as a good arrangement for the kids.
>
> A lot of it comes down to, in their opinion, difficulty getting services set up.
>
> Both kids have needs in school, via a 504 plan or an IEP.
>
> If they were here to testify, people working with the kids would say that it's almost astonishing that it took as long as it did to get any services in[]tact.
>
> ….
>
> If there's a lot of back and forth, there's a lot of facts that the [c]ourt would consider if this matter proceeded.
>
> That would certainly fall under the factors of [WIS. STAT. §] 767.41.
>
> Just like anything, a hearing is necessary.

¶8 The circuit court then heard Glidewell's attorney argue that the experts Riley relied on to support her position did not opine with any degree of probability in their field of expertise as to the issues presented in this case. Glidewell's attorney ended by asserting, "this is just mom taking another shot at relitigating what's been litigated."

¶9 The circuit court dismissed Riley's motion. In doing so, it prefaced its remarks by explaining that it read ***Stuligross v. Stuligross***, 2009 WI App 25, 316 Wis. 2d 344, 763 N.W.2d 241, to hold that it had discretionary power to determine what evidence to allow into the record. The circuit court stated that it was persuaded by the arguments that it should dismiss Riley's motion, explaining, "I'll adopt [the arguments with regard to dismissal] as—as the reasons and

rationale for why the [c]ourt is—is going to dismiss this motion for *de novo* review." (Italics added.) The circuit court continued: "But I also want it to be abundantly clear that I did review everything relevant to this motion[.]" The circuit court specifically detailed the children's academic records, which reflected "tremendous progress," and expressed concerns about the conclusions of one of Riley's experts as set forth in a report.

¶10 The circuit court ended its remarks by stating: "I have everything I need from a *de novo* standpoint to say, A, there's no substantial change in circumstances, B, … it is not in the best interest of these children to remove educational decision-making, tie-break authority, from [Glidewell]." (Italics added.)

¶11 In the written order that followed, the circuit court pointed to footnote eight in the ***Stuligross*** decision as support for its position that it was not required to hear testimony during a *de novo* hearing. Footnote eight states: "We do not suggest that the [circuit] court is required to hear any and all testimony offered by either party. [Circuit] courts have discretion to limit the introduction of evidence pursuant to the Wisconsin Rules of Evidence." ***Id.***, ¶14 n.8. The circuit court, in the order, made clear that it "ha[d] everything it need[ed] to determine that there has been no substantial change in circumstances and it is not in the children's best interests to remove [Glidewell]'s final decision making in educational matters. Therefore, [Riley]'s underlying and *de novo* motions are therefore dismissed on the merits."

¶12 Riley appeals arguing that her motion was dismissed without a hearing *de novo.* She submits that the plain meaning of WIS. STAT. § 757.69(8) required the circuit court to take testimony. If footnote eight in the ***Stuligross***

decision is interpreted as it was applied by the circuit court in this matter, Riley argues that evidentiary hearings will no longer be necessary. *See* ***id.***, 316 Wis. 2d 344, ¶14 n.8. She asserts: "Rather, the [circuit] court could simply [] review the parties' pretrial submissions; pick and choose the submissions that will be relied upon as a basis for the decision; exclude everything else (including things that haven't even been presented yet) without any explanation; and rule on the case without a shred of sworn testimony."

II. ANALYSIS

¶13 To resolve this appeal we must interpret WIS. STAT. § 757.69(8). The interpretation of a statute is a question of law that we review *de novo*. *See* ***State v. Fernandez***, 2009 WI 29, ¶20, 316 Wis. 2d 598, 764 N.W.2d 509. "[W]e have repeatedly held that statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted).

¶14 A decision of a family court commissioner is reviewable pursuant to WIS. STAT. § 757.69(8). *See* WIS. STAT. § 767.17. Section 757.69(8) provides:

> 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*.

(Italics added.)

¶15 Glidewell contends that the circuit court did, in fact, conduct a "full" *de novo* hearing. The GAL, in turn, contends that the circuit court properly relied

on the parties' various submissions "when deciding to dismiss the *de novo* motion without holding an evidentiary hearing." (Italics added.) The GAL claims that a hearing *de novo* "does not require an evidentiary hearing, as the [c]ourt retains discretion whether to hear any testimony whatsoever[.]" Both Glidewell and the GAL argue that ***Stuligross*** is distinguishable from the case at hand.

¶16 The factual distinctions Glidewell and the GAL rely upon are irrelevant. ***Stuligross*** makes clear that "[t]he plain meaning of WIS. STAT. § 757.69(8), specifically the phrase 'hearing *de novo*,' required the [circuit] court to afford [the movant] an opportunity to present testimony at the hearing," unless the parties stipulated as to what the testimony would be. *See* ***Stuligross***, 316 Wis. 2d 344, ¶12 (italics added). There were no such stipulations in this case. Consequently, the circuit court was required to afford Riley an opportunity to present testimony. *See* ***id.*** ("A *de novo* hearing requires a fresh look at the issues, including the taking of testimony[.]"); *see also* ***id.***, ¶13 ("This is not the first time we have recognized that *de novo* hearings of a family court commissioner's decision require the taking of testimony.").

¶17 Additionally, we agree with Riley that the circuit court misapplied footnote eight in ***Stuligross***. ***Id.***, ¶14 n.8 ("We do not suggest that the [circuit] court is required to hear any and all testimony offered by either party. [Circuit] courts have discretion to limit the introduction of evidence pursuant to the Wisconsin Rules of Evidence."). Riley acknowledges that the circuit court is the ultimate gatekeeper of evidence at trial. Here, the parties each submitted witness lists with brief statements as to the anticipated testimony of each individual. Setting aside the circuit court's stated concerns regarding one of Riley's experts, we note that there is no indication in the record as to its basis for excluding *all* of her witnesses.

¶18 Riley did not receive the hearing *de novo* to which she was entitled. Consequently, we reluctantly reverse and remand with directions that a hearing, consistent with WIS. STAT. § 757.69(8), be conducted before the circuit court.[4]

By the Court.—Order reversed and cause remanded.

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

[4] In concluding her motion to dismiss, the GAL wrote: "And repeating the wisdom of the predecessor [c]ourts and [g]uardians *ad* [*l*]*item*, it would be far wiser for the parents to work together to improve their children's academic experiences rather than litigating over same." (Italics added.)