COURT OF APPEALS
DECISION
DATED AND RELEASED

November 19, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3655

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

IN THE INTEREST OF LAURA V.L.,
A PERSON UNDER THE AGE OF 18:

ELTON V.L. AND EILEEN V.L.,

PETITIONERS-RESPONDENTS,

V.

CHERYL V.L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Green Lake County: RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Cheryl V.L. has appealed from an order entered in the trial court on December 13, 1996, scheduling dates for holiday and summer visitation between Cheryl's daughter, Laura, and Laura's paternal grandparents,

Elton and Eileen V.L. Cheryl raises numerous issues on appeal. However, most of them were resolved by a final order issued in the trial court on August 12, 1996, which was never appealed by Cheryl. Because the remaining issues raised by her pertaining to the December 13, 1996 order have no merit, we affirm the order.

This action was originally commenced when Elton and Eileen filed a petition for grandparent visitation rights pursuant to § 880.155, STATS. A guardian ad litem was appointed for Laura and a hearing was held on June 18, 1996. Prior to that hearing, the guardian ad litem filed a report recommending that visitation be ordered, including visitation on alternate weekends and at least two weeks of visitation in the summer.

After hearing the matter the trial court issued an order which was entered on August 12, 1996, finding that it was in the best interest of Laura to have visitation with Elton and Eileen. The August 12, 1996 order provided that visitation would occur on a schedule extending the schedule previously established in a temporary order issued at a hearing on December 19, 1995. The August 12, 1996 order provided that alternate weekend visitation would be provided and that "the matter of extended visitation for the summer and holiday visitation be negotiated between the parties." The order provided that if the parties failed to resolve these issues, Elton and Eileen could pursue an amendment to the visitation order in court.

Following entry of the August 12, 1996 order, Elton and Eileen proposed specific visitation dates during the Christmas and Easter holidays and during Laura's summer vacation. When Cheryl failed to respond to their requests, they filed a motion requesting that the court issue an order granting visitation on the specified dates. The parties appeared in court on the matter on December 5,

1996. At the December 5, 1996 hearing, the trial court refused to permit testimony or argument on the issue of whether it was in Laura's best interest to have visitation on the days requested. The court held that it had already found and determined that it was in Laura's best interest to have visitation over the holidays and a period of extended visitation in the summer, and that the only thing left open was the scheduling. It stated that it had been left to the parties to work out the dates in a reasonable manner, but that it had not been done because Cheryl was refusing to abide by the court's prior determination. It held that because there was nothing unreasonable about the grandparents' proposal and because Cheryl had offered no reasonable alternative, visitation on the schedule proposed by the grandparents would be ordered. The trial court subsequently entered a written order on December 13, 1996 scheduling the requested dates. Cheryl appealed from the December 13, 1996 order.

On its face, the August 12, 1996 written order was unclear as to whether it simply required the parties to resolve the dates for holiday and summer visitation which had been determined to be warranted by the trial court, or whether the trial court had not yet addressed whether any holiday and extended summer visitation would occur. When an order or judgment is ambiguous, we accord great deference to a trial court's interpretation of it and we will not disturb the trial court's interpretation unless it is devoid of reason. *See* ***Estate of Schultz v. Schultz,*** 194 Wis.2d 799, 802, 535 N.W.2d 116, 117 (Ct. App. 1995).

At the December 5, 1996 hearing, the trial court held that it had already found that it was in Laura's best interest to have holiday and extended summer visitation with her grandparents, and that the only thing left open by the August 12, 1996 order was scheduling. This interpretation is consistent with the language in the August 12, 1996 order indicating that the schedule established in

the temporary order on December 19, 1995 was continued. That prior order provided for alternate weekend visitation, plus visitation over the Christmas holidays from December 26, 1995 to January 1, 1996.

In accepting the trial court's construction of the August 12, 1996 order, we also note that Cheryl has provided no transcript of the June 18, 1996 hearing which led to that order. When an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling. *See* ***Fiumefreddo v. McLean,*** 174 Wis.2d 10, 27, 496 N.W.2d 226, 232 (Ct. App. 1993). We therefore assume that the missing transcript supports the trial court's determination that it had previously determined that it was in Laura's best interest to have visitation with her grandparents during holidays and summer vacation, and that the only matter left open after entry of the August 12, 1996 order was scheduling the actual dates.

Cheryl did not appeal the August 12, 1996 order within ninety days of its entry. Because that order resolved the issue of whether it was in Laura's best interest to have visitation with her grandparents, including holiday and extended summer visitation, several of the issues raised by Cheryl in her appellant's brief fall out of this case.[1] Because the propriety of summer and

[1] Cheryl contends that if the August 12, 1996 order resolved the issue of whether Elton and Eileen were entitled to holiday and extended summer visitation, it was nonfinal until the scheduling of those visitation periods actually was ordered. She contends that she may therefore challenge determinations made in the August 12, 1996 order within the context of this appeal. *See* RULE 809.10(4), STATS.

(continued)

holiday visitation had already been determined, the trial court was not required to conduct a new evidentiary hearing on December 5, 1996, or to receive additional input regarding Laura's wishes under § 880.155(3), STATS. Contrary to Cheryl's contention, it was also not required to compel Laura's guardian ad litem to appear at the hearing. Appointment of a guardian ad litem is not mandatory in all proceedings affecting visitation rights and involves the exercise of discretion. *See* ***Bahr v. Galonski,*** 80 Wis.2d 72, 84, 257 N.W.2d 869, 874 (1977). Because the only issue at the December 5, 1996 hearing was what dates holiday and summer visitation would occur, the trial court acted within the scope of its discretion in determining that it was unnecessary for the guardian ad litem to appear.

Contrary to Cheryl's contention, § 880.155(4), STATS., did not mandate that the trial court find good cause for a modification of the August 12, 1996 order at the December 5, 1996 hearing. The December 1996 proceedings constituted an execution and enforcement of the August 12, 1996 order, not a modification of it.

Cheryl's remaining arguments also provide no basis for disturbing the December 13, 1996 order. She contends that the visitation dates ordered were excessive and that the trial court erroneously exercised its discretion by

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We disagree. A final judgment or order under § 808.03(1), STATS., is one which terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined. *See* ***Anchor Sav. & Loan Ass'n v. Coyle,*** 148 Wis.2d 94, 100, 435 N.W.2d 727, 729 (1989). In this case, the August 12, 1996 order determined the entire matter in litigation under the § 880.155, STATS., petition for grandparent visitation rights filed by Elton and Eileen, including their right to holiday visitation and extended visitation in the summer. The proceedings commenced by Elton and Eileen on November 26, 1996, requesting an order directing visitation on certain specified dates constituted a proceeding to execute the August 12, 1996 order and to enforce rights which had already been adjudicated. These subsequent proceedings did not affect the finality and appealability of the August 12, 1996 order. *Cf.* ***Anchor Sav.***, 148 Wis.2d at 101, 435 N.W.2d at 730.

automatically granting the relief requested by Elton and Eileen when she refused to compromise. However, because we must begin with the premise that Elton and Eileen are entitled to visitation with Laura during holidays and the summer, we cannot say that visitation for five days during the Christmas holidays, three days during Easter week, and two weeks in the summer is unreasonable. Cheryl offered no alternative dates and made no showing that the particular dates requested by Elton and Eileen were unreasonable. Her sole contention was that any visitation beyond the alternate week visitation that already existed was excessive. Because the trial court had determined this issue adversely to Cheryl in August 1996, no basis exists to determine that it acted unreasonably or erroneously exercised its discretion in accepting the dates proffered by Elton and Eileen.

Cheryl also argues that the trial court erred by awarding visitation which was to be delegated to others. Assuming arguendo that Cheryl is entitled to raise this issue in the context of this appeal, it is meritless. As is correctly pointed out by Elton and Eileen, the fact that other relatives might be present when Laura visits them and their desire that she have contact with other family members does not constitute delegating visitation rights to another.

Elton and Eileen also ask us to find that Cheryl's appeal is frivolous under RULE 809.25(3), STATS. We decide as a matter of law whether an appeal is frivolous. *See* ***NBZ, Inc. v. Pilarski,*** 185 Wis.2d 827, 841, 520 N.W.2d 93, 98 (Ct. App. 1994). To find an appeal to be frivolous, we must determine that it was filed in bad faith for the sole purpose of harassing or maliciously injuring another or that it was without any reasonable basis in law or equity. *See* ***id.***

Elton and Eileen allege that Cheryl brought this appeal solely to harass them and wear them down so that they cease pursuing their visitation rights.

They also contend that the appeal had no reasonable basis in law because their right to visitation was resolved by the August 12, 1996 order and could not be properly challenged in this appeal.

While we agree with Elton and Eileen's ultimate argument that the issues raised by Cheryl lack merit, we note that determining whether an order is final and appealable is frequently difficult. *See* ***Radoff v. Red Owl Stores, Inc.,*** 109 Wis.2d 490, 494, 326 N.W.2d 240, 242 (1982). We cannot say that Cheryl had no reasonable basis for believing that she could challenge the order requiring summer and holiday visitation in the context of this appeal. We therefore are not persuaded that she brought this appeal solely for purposes of harassing Elton and Eileen and deny their request for costs and fees for a frivolous appeal.

By the Court.—Order affirmed.

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