COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-0235

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

IN RE THE PATERNITY OF LINDSEY M.P.:

ELIZABETH P.,

PETITIONER,

V.

MARK R.F.,

RESPONDENT-RESPONDENT-CROSS-APPELLANT,

V.

JOHN A.P.,

APPELLANT-CROSS-RESPONDENT.

WASHINGTON COUNTY, #91 FA 462,
IN RE THE MATTER OF:

JOHN A.P.,

PETITIONER,

V.

ELIZABETH A.P. AND MARK R.F.,

RESPONDENTS.

APPEAL and CROSS-APPEAL from an order of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. John P., the maternal grandfather of Lindsey P., appeals both the trial court's determination that he is unfit to be the legal custodian of Lindsey, and the trial court's award of temporary custody of Lindsey to his niece and nephew for a period of two years. Mark F., the adjudicated father of Lindsey, cross-appeals the trial court's finding that he is unfit to be awarded custody. Mark F. also appeals the trial court's decision denying his request that the trial court recuse itself because of an ex parte communication and evidence of bias.

We conclude that the trial court properly exercised its discretion in finding that the child's grandfather, John P., was unfit, and in determining that Lindsey's father, Mark F., was also unfit to have custody. We also affirm the trial court's determination that it was not biased. We reverse, however, the trial court's decision to give temporary custody of the child to the grandfather's niece and nephew, Mark P. and Dawn P., because Mark P. and Dawn P. do not fall within the class of relatives listed in § 48.02(15), STATS., to whom the trial court can award custody under § 767.24(3), STATS. Thus, the matter must be remanded for

further proceedings and for the trial court to enter a custody order consistent with the statute.

I. BACKGROUND.

This litigation's long and complicated history started as a paternity suit in 1991, following Lindsey's birth to Elizabeth P. on August 9, 1988.[1] Mark F., named the father in the suit, was ultimately adjudicated the father on May 4, 1992 in a default proceeding when he failed to appear. Following the adjudication, little activity occurred in the case except several actions seeking enforcement of the child support order against Mark F.

In 1995, Lindsey's mother, Elizabeth P., committed suicide. Shortly thereafter, Lindsey began living with Mark F. In July 1995, while the child was living with Mark F., he filed a petition seeking a temporary restraining order against John P., asking that John P. have no contact with Lindsey based upon Mark F.'s allegations that John P. had sexually abused Lindsey. As a result, the trial court appointed a guardian ad litem to represent the child.[2] The case was then transferred to Washington County for consolidation with an action in that county brought by John P. seeking to enforce a visitation order entered years before. Both actions were then transferred back to Milwaukee County when Washington County refused to accept the consolidation.

[1] Some of the records indicate the child's birth date as August 8, 1988.

[2] This court ordered the guardian ad litem to file a brief. Mark F. has brought a motion asking that the brief be struck because it contains matters not in the record. We deny the motion to strike the brief. We have, however, disregarded all references in the brief which either are not contained in the record or lack record citations.

In late 1995, John P. filed a motion seeking either custody of Lindsey (since the existing order had given custody to Elizabeth) or, alternatively, an order establishing periods of grandfather visitation. Shortly thereafter, John P. brought a motion seeking sanctions against Mark F. because of Mark F.'s refusal to cooperate during his deposition. Due to Mark F.'s failure to cooperate, the trial court ordered temporary custody transferred to John P. and ordered visitation with Mark F. to be supervised.

Following a lengthy hearing, the trial court found that both Mark F. and John P. were unfit and awarded temporary custody to John P.'s niece and nephew for a period of two years. The trial court also awarded visitation of Lindsey to both Mark F. and John P. John P. appeals the trial court's determination that he is unfit and Mark F. files a cross-appeal on the same basis. John P. also appeals the decision to give temporary custody to his niece and nephew, and Mark F. contends the trial court should have recused itself.

Finding of Unfitness for Custody

Standard of Review

The general rule regarding custody disputes between parents and third parties is set out in ***Barstad v. Frazier***, 118 Wis.2d 549, 568-569, 348 N.W.2d 479, 489 (1984).

> We conclude that the rule to be followed in custody disputes between parents and third parties is that a parent is entitled to custody of his or her children unless the parent is either unfit or unable to care for the children or there are compelling reasons for awarding custody to a third party.

This rule has been codified in ch. 767 where custody may be awarded to a relative or agency if: "the court finds that neither parent is able to care for the child

adequately or that neither parent is fit and proper to have the care and custody of the child, the court may … transfer legal custody of the child to a relative of the child ….” Section 767.24(3), STATS.

As set forth in ***Matter of Guardianship of Jenae K.S.***, 196 Wis.2d 16, 539 N.W.2d 104 (Ct. App. 1995), the standard of review when the custody dispute is between a parent and a third party is a mixed question of fact and law. *See* ***id.*** at 20, 539 N.W.2d at 105.

> Whether a parent is “unfit” or whether “compelling reasons” exist to award custody to a third party is a mixed question of fact and law. We separate mixed questions of fact and law into two components, reviewing disputed issues of material fact under sec. 805.17(2),[3] Stats., and reviewing the legal issues *de novo*.

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[3] Section 805.17(2), STATS., provides:

> **(2)** EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall either file its findings and conclusions prior to or concurrent with rendering judgment, state them orally on the record following the close of evidence or set them forth in an opinion or memorandum of decision filed by the court. In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a referee may be adopted in whole or in part as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of ultimate fact and conclusions of law appear therein. If the court directs a party to submit proposed findings and conclusions, the party shall serve the proposed findings and conclusions on all other parties not later than the time of submission to the court. The findings and conclusions or memorandum of decision shall be made as soon as practicable and in no event more than 60 days after the cause has been submitted in final form.

Id.

Analysis

John P. contends that the trial court correctly found Mark F. to be an unfit parent, but erred in finding him to be unfit as well. John P. acknowledges that Mark F. has a superior position in the custody dispute as the natural parent of Lindsey, but submits that there are compelling reasons why he (John P.) should be granted custody. The guardian ad litem is aligned with John P. and also argues that the trial court erred in finding John P. unfit. Mark F., on the other hand, contends that the trial court erred in finding him unfit to have custody of Lindsey, but he asserts that the trial court correctly concluded that John P. was unfit. We are not persuaded by either argument.

Because a review of whether the trial court erred in finding both men unfit may foreclose a review of whether there were compelling reasons for John P. to be awarded custody, we address this issue first.

We note that neither the term "fit" nor "unfit" is defined in Chapter 767, STATS. Section 767.24 does, however, give some guidance. It lists several factors to be reviewed in custody disputes which, if present, could result in the trial court's determination that a party is unfit. They include: whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party, *see* § 767.24(5)(g); whether there is evidence of interspousal battery as described under § 940.19 or domestic abuse as defined in § 813.12(1)(a), *see* § 767.24(5)(i); and whether either party has or had a significant problem with alcohol or drug abuse, *see* § 767.24(5)(j). This list of factors makes no mention of the term "unfit," and ***Barstad*** and its progeny suggest that conduct that constitutes unfitness of a parent or party is not exhaustive. As noted, both the statute and

Barstad require a finding of either parental unfitness or compelling reasons before custody can be given to a non-parent. ***Barstad*** also gives some guidance for evaluating who is unfit. "We conclude that in the absence of compelling reasons the principles followed in cases involving termination of parental rights should be followed where a request for a custody change from a parent to a third party is presented to a court." ***Barstad***, 118 Wis.2d at 556, 348 N.W.2d at 483.

Following ***Barstad***'s directive, we look to the standards found in the children's code for the termination of parental rights. Actions which may subject a parent to the termination of their parental rights include, *inter alia*, abandonment, parental disability, child abuse, and failure to assume parental responsibility, *see* § 48.415, STATS. Many of the factors listed in § 48.415 are relevant here. In determining whether a party is unfit, case law also permits the trial court to consider past conduct of the parties seeking custody, as well as their prior physical and emotional conditions, and any other previous circumstances which are relevant and material to the issue of child custody. *See* ***Larson v. Larson***, 30 Wis.2d 291, 299, 140 N.W.2d 230, 235 (1966).

Much of the debate surrounding the issue of John P.'s moral fitness concerned Mark F.'s contention that John P. had sexually abused his daughter and may have sexually abused his granddaughter. Mark F.'s complaints to the authorities that John P. had engaged in sexual misconduct with Lindsey resulted in findings that the accusations were unfounded. The same result was reached by the trial court. John P. and the guardian ad litem seize upon this finding and argue that since John P. did not sexually abuse Lindsey, there were no grounds to find John P. unfit. We disagree.

There is ample evidence in the record to support the trial court's discretionary findings that both Mark F. and John P. were unfit. In the trial court's oral decision, it found that John P. had engaged in physical abuse of his wife, a woman who suffered from mental health problems, and who also committed suicide. The trial court also noted that John P. had a terrible relationship with his older daughter who testified against him at trial and who suggested that many of her and her sister's problems were the fault of John P.'s parenting. The trial court also noted that John P. had clashed with his deceased daughter, Elizabeth, Lindsey's mother, striking her and ordering her out of his home. In its oral decision, the trial court also expressed concern that John P.'s negative habits, particularly his tendency to engage in physical abuse, would reoccur if he were given custody. Finally, the trial court noted that the degree of alienation between Mark F. and John P. was significant, finding that their vendetta was "having a detrimental damaging effect on the child."

The trial court's oral decision reveals even stronger evidence supporting a finding that Mark F. was unfit. The trial court found that Mark F. was "amoralistic," as Mark F. did not have "a sense of values that can be focused upon that are important in raising a child with all the attributes that a good, loving parent has …." The trial court also noted Mark F.'s extensive contacts with the criminal justice system, including a felony record, for which Mark F. showed little remorse. The trial court was also troubled by Mark F.'s "perceptions on life," presumably a reference to Mark F.'s vagabond lifestyle as a carnival worker and the fact that Mark F. proudly characterized himself as an "honest thief." As noted, the trial court also viewed Mark F. as someone totally unwilling to cooperate with John P.

The record overwhelmingly supports the trial court's findings. John P.'s daughter, Lee, testified that John P. abused her mother both physically and verbally, and that she (Lee) harbored suspicions that her father had had inappropriate sexual contact with Elizabeth. She told the court that while growing up, her father was cruel, insensitive and drank to excess.

The trial court knew that Mark F. was sentenced to a six-month term for his failure to support Lindsey prior to her mother's death and, although disputed at trial, evidence was admitted that Mark F. had at various times admitted that he only lived with Lindsey for less than a month before Elizabeth's death. The trial court also knew that a temporary restraining order had been obtained by Elizabeth who claimed under oath that Mark F. had beaten her on more than one occasion. Further support for the trial court's finding of Mark F.'s unfitness is the psychological evidence introduced at trial by a psychologist who testified that Mark F. had been diagnosed with having an antisocial personality disorder, a condition that is generally untreatable and anathema to the successful parenting of a child.

A review of the trial court's findings and the record persuades us that the trial court's discretionary findings of unfitness must be upheld. Both men had backgrounds which reflected poorly on their parenting skills. In the past, Mark F., a convicted felon, had failed to support Lindsey financially and had had little to do with her prior to Elizabeth's death. Both Mark F. and John P. had a history of physical and emotional abuse. John P. also has had a poor track record in the raising of his children. Mark F.'s psychological profile also boded poorly for Lindsey if she were placed in his care. Further, the two men demonstrated absolutely no ability to cooperate with one another. As the trial court observed, "you've lashed out against each other. And you've used this courtroom process as

a killing field to say terrible things about each other ...." Had custody been given to one or the other, it would have placed Lindsey in an environment where her two closest relatives would be pitted against one another.

Trial Court Bias

Mark F. contends that the trial court should have recused itself pursuant to § 757.19(2)(g), STATS., because the trial court admitted to an ex parte conversation concerning the case after the aborted attempt at consolidating the Milwaukee paternity suit with an existing Washington County matter. The conversation was initiated by a lawyer after the cases left for Washington County, but before the cases were returned to Milwaukee County. Mark F. contends that pursuant to § 757.19(2)(g), the trial court was obligated to "conduct an inquiry" by taking evidence or conducting a fact finding process. We disagree.

On December 26, 1995, the trial court placed on the record and advised all the parties, including Mark F., that he had engaged in an ex parte communication at a time when the matter had been transferred to Washington County. "[W]e're in the courtroom, and I feel duty bound to share this, because I didn't think the case was going to come back--I'm not satisfied whether it causes a motion for recusal, and I still feel I can be fair and impartial, but I've got to explain the process." The trial court then related that an attorney contacted him wanting to see the file as there was some thought that Mark F. might have been involved in Elizabeth's death. The trial court went on to state that subsequently the trial court learned that Mark F. was in Mexico when Elizabeth killed herself and that the suspicion had no basis. The trial court then advised the parties that "it's the court's position that this judge can continue to hear this case in a fair and impartial way, and I'm going to, but I'm going to give everybody a chance to try

to move me out of the case, if they can show a bias or prejudice." The trial court also told the parties that they must respond by the next court hearing date. Mark F.'s formal request for recusal was not filed until several court appearances later. As noted in John P.'s brief, "Only on January 23, 1996, with Attorney Bohren after three appearances with three different lawyers, did the respondent move [the trial judge] to recuse himself." At this time the trial court ruled that it had already decided the recusal motion and the motion was waived. We agree.

Section 757.19(2)(g), STATS., reads:

> **(2)** Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> ….
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

The statute requires disqualification when a judge determines, or it appears, that he or she cannot act impartially in a case. *See* ***State v. Harrell***, 199 Wis.2d 654, 658, 546 N.W.2d 115, 117 (1996). This assessment is to be made by the judge; it is not the assessment of the external world. *See* ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis.2d 175, 182, 443 N.W.2d 662, 665 (1989). Contrary to Mark F.'s argument, nothing in the statute or case law requires the trial court to take testimony or conduct a formal fact finding hearing. The trial court must merely indicate to the parties its subjective judgment on the issue of bias or prejudice. Here the trial judge disclosed the ex parte communication and then stated that he felt he could be fair. In effect, what the trial court did was conditionally rule that there was no need for disqualification,

subject to the parties submitting any objections at the next hearing. When no objections were raised, the trial court's ruling was no longer conditional.

Further, under these facts, we conclude that this case does not warrant disqualification because of an appearance of impropriety. The trial judge affirmatively stated that, despite the ex parte communication, he could continue to hear the case in a fair and impartial manner. Thus, the appearance of impartiality remained. We also conclude, as did the trial court, that Mark F. could not successfully raise the bias issue later as it was waived. The trial court is not obligated to revisit the identical matter every time a new lawyer comes into the case.

Temporary Custody to Lindsey's Second Cousins

After determining that neither the biological father nor the maternal grandfather was an appropriate candidate for custody of Lindsey, the trial court then took the extraordinary step of awarding temporary placement for a period of two years to Dawn P. and Mark P., the niece and nephew of John P., who had not formally sought custody, with the caveat: "I'm going to order temporary placement, and that's going to continue for a period of two years. And at that time, if either of you can demonstrate [a change in behavior], and principally you, Mr. F. because you have the stronger parental rights as the biological father … [placement may be changed]."

The guardian ad litem and John P. both argue that the trial court erred in its decision because Dawn P. and Mark P. were not parties to the action. The guardian ad litem also argues it was unwise to give custody of his ward to people who had not had the same level of scrutiny as had John P. and Mark F. We note that custody determinations depend on first-hand observation and experience

with the persons involved. *See* ***Hollister v. Hollister***, 173 Wis.2d 413, 416, 496 N.W.2d 642, 643 (Ct. App. 1992). We agree that the trial court erred in giving custody to Dawn P. and Mark P., but we do so for different reasons.

Section 767.24, STATS., anticipates the possibility that the trial court would find both parent/parties to be unfit. Section 767.24(3)(a), STATS., reads:

> **(3) Custody to agency or relative**. (a) If the interest of any child demands it, and if the court finds that neither parent is able to care for the child adequately or that neither parent is fit and proper to have the care and custody of the child, the court may declare the child to be in need of protection or services and transfer legal custody of the child to a relative of the child, as defined in s. 48.02(15), to a county department, as defined under s. 48.02(2g), or to a licensed child welfare agency. If the court transfers legal custody of a child under this subsection, in its order the court shall notify the parents of any applicable grounds for termination of parental rights under s. 48.415.

Section 48.02(15), STATS., does not list second cousins among the available relatives. It reads: "'Relative' means a parent, grandparent, stepparent, brother, sister, first cousin, nephew, niece, uncle or aunt. This relationship may be by consanguinity or direct affinity." ***Id.*** Mark P. and his wife, Dawn P., do not qualify under the statute as Mark P. is the son of John P.'s brother. Although it is possible that Dawn P. and Mark P. may be awarded custody through another legal route, the trial court in this family court custody suit was limited to the options found in the statute and was not free to award custody to those not listed.[4]

[4] Since we conclude that the trial court erred in awarding custody to these relatives, we need not address other arguments concerning whether the trial court's order was improper. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983). Thus, since we have disposed of the matter on one ground, we need not address the others.

On remand, we direct the trial court to conduct further proceedings as it deems necessary to allow for the proper determination of custody consistent with the requirements of § 767.24(3), STATS. Given the voluminous record in this case, and in the interest of judicial economy, we remand this matter back to the original trial judge who conducted the trial. *See* WIS. CONST. art. VII, sec. 5(3) (appellate court has supervisory authority over all actions and proceedings in this district's trial courts).

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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