COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0630

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

ANNE E. CZARNECKI (N/K/A GERARD),

PLAINTIFF-APPELLANT,

V.

PAUL A. CZARNECKI,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: ROBERT C. CANNON, Reserve Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

CURLEY, J. Anne Gerard (Anne) appeals from two post-judgment orders in her divorce case. She claims the trial court erroneously exercised its discretion when, in denying her motion seeking a modification of the existing custody and placement order, the trial court authorized a third party to institute a

ninety-day supervised visitation,[1] which was later invoked, if Anne failed to cooperate. She also appeals the trial court's order requiring her to contribute to the attorney fees of her former husband, Paul Czarnecki (Paul), after finding that she overtried her motion seeking a modification of the custody and placement order, and from the trial court order requiring her to make a lump sum payment to the guardian ad litem because of his complaint that he accepted a payment plan of only $75 a month for outstanding fees without knowing of her receipt of the proceeds from the sale of the family home.

We conclude that the issue of the court's authority to order a third party to invoke a ninety-day supervised visitation order is moot as the supervised visitation was concluded prior to this appeal. Further, we conclude that the trial court properly exercised its discretion when it concluded that Anne overtried the matter and when it ordered Anne to contribute to Paul's attorney fees. Finally, we are satisfied that the trial court properly exercised its discretion when it required Anne to make a lump sum payment to the guardian ad litem for outstanding fees within seventy days when she failed to provide documentation and account for the money she received from the sale of the family home. Therefore, we affirm.

I. BACKGROUND.

This is Anne's second appeal in this case. The parties' litigation dates back to 1993 when the initial divorce action was filed. A final divorce judgment was entered on September 19, 1994, following a contested trial. At trial,

[1] Since 1987 the term "physical placement," rather than "visitation," is usually used when referring to parents. *See* II THOMAS A. BAILEY, ALLAN R. KORITZINSKY & LAURA SCHMIDT LAU, FAMILY LAW CASENOTES AND QUOTES 68 (Index) (State Bar of Wisconsin 1990). We have used the term "visitation," as the parties frequently use the term "visitation" in their briefs; it is being used interchangeably with the word "placement" in this opinion.

the court determined that the best interest of the children would be served by awarding the parties joint custody with Paul having primary placement of their two children during the school year and Anne having primary placement during the summer. Each parent was given periods of visitation with the children when the other party had primary placement. Just two months after the trial was concluded, Anne brought a motion asking the trial court to reconsider its judgment concerning custody and primary placement of the children. The hearing on this motion was delayed because the trial court recused itself, but ultimately all the pending post-judgment matters, including the motion to reconsider, were heard and denied by a reserve judge. Anne appealed to this court portions of the reserve judge's orders, including the order denying her motion requesting reconsideration of the custody and placement order and the order denying the contempt motion she brought against Paul.

At issue in the first appeal was the following statement made by the reserve judge at the hearing to reconsider the custody and placement provisions: "And the court is amending that order to be that if, after evaluation down the road, if the court is satisfied that everything is okay, and that Anne can have primary custody of the children again, the court is going to order that she have their custody returned to her." However, the signed order emanating from this hearing makes no mention of this condition.

On March 18, 1997, this court rendered an unpublished opinion. *See* ***Czarnecki v. Czarnecki***, No. 96-0195, unpublished slip op. (Wis. Ct. App. Mar. 18, 1997). Pertinent to this appeal, the decision affirmed the reserve judge's denial of Anne's request that Paul be found in contempt and, with respect to the reserve judge's statement concerning the possibility that custody may be returned to Anne in the future, we noted that "to the extent that the oral ruling may be

interpreted to order transfer of placement contingent upon a future event occurring, it would be violative of existing law." ***Czarnecki***, unpublished slip op. at 5; *see also* ***Koeller v. Koeller***, 195 Wis.2d 660, 667-68, 536 N.W.2d 216, 219-20 (Ct. App. 1995) (trial court may not issue prospective custody orders); ***Schwantes v. Schwantes***, 121 Wis.2d 607, 628-30, 360 N.W.2d 69, 78-80 (Ct. App. 1984) (a conditional custody award is violative of statutory law and public policy).

Before the appellate decision was released, Anne brought yet another motion requesting a modification of the custody and placement order, which was denied on December 16, 1996. In the course of denying this motion, the trial court determined that the children were being harmed by the failure of Anne to take the children to various activities previously scheduled by Paul when she had visitation with the children during the school year. The trial court then adopted a recommendation of the case manager who was monitoring the exchanges of the children, that a ninety-day supervised visitation be authorized if Anne failed to cooperate in the future. The decision as to whether the supervised visitation order would go into effect was given to the case manager. The case manager invoked the ninety-day supervised visitation order in February 1997.

Also heard in December 1996 was Paul's motion requesting an attorney fee contribution from Anne based upon his allegations that Anne was guilty of overtrying her motion asking for a modification of custody and placement. The trial court agreed and ordered her to contribute $6,000 towards Paul's attorney fees. The trial court also ordered Anne to make a lump sum

payment of $2,400[2] within 70 days to the guardian ad litem for outstanding fees because Anne refused to provide documentation, and to account for the $23,000 she obtained through the sale of the family home. It is from these orders that Anne now brings the present appeal.

II. ANALYSIS.

Anne's first claim of error deals with the trial court's adoption of a recommendation by the case manager who, when testifying in the December motion for a change of custody, suggested that the trial court order a one time ninety-day supervised visitation if Anne continued to disrupt the children's scheduled activities and lessons when she had the children during the school year. The trial court ordered that "there will be a supervised visitation for a 90-day period in the event Miss Gerard has failed to cooperate with [the case manager] and the children's extracurricular activities." Several months later the case manager invoked the one-time ninety-day supervised visitation order. In a letter to the trial court and the attorneys, the case manager explained that she invoked the order because of what she termed "continuous devious behavior and lack of compliance on behalf of Anne E. Gerard." In response, Anne filed a motion on April 24, 1997, requesting a temporary stay pending appeal of the supervised visitation order.[3]

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[2] The actual order signed by Judge Sheedy on behalf of Judge Cannon states that the guardian ad litem is to be paid $2,900.

[3] The record reveals that a great deal of correspondence occurred in trying to determine who would handle this matter prior to the filing of the motion because the reserve judge was then in Florida. Anne made several unsuccessful attempts at appealing the trial court's order without a signed trial court order and this lack of a signed order also apparently led to Anne's failed attempt at bringing a supervisory writ.

In her motion filed on April 24, 1997, Anne set forth many of the arguments she now raises in her brief. None of those arguments, however, was ever decided by the trial court, because on May 13, 1997, Anne sent a letter indicating that she wished to formally withdraw the motion, claiming that the matter was moot. Consequently, most of the legal arguments she now raises with respect to the propriety of the ninety-day supervised visitation order have never been heard by the trial court. The only objection raised and preserved at the time that the trial court made its order was trial counsel's statement, "I object to any orders for supervised visitation. That is completely uncalled for." Thus, it would appear that the sole surviving challenge to the trial court's order is that the circumstances did not call for such an order. Ordinarily, pursuant to ***State v. Rogers***, 196 Wis.2d 817, 828-29, 539 N.W.2d 897, 901 (Ct. App. 1995), a failure to raise a specific challenge in the trial court waives the right to raise it on appeal. Moreover, we note that in Anne's letter she indicated that she was abandoning her request for a hearing on the matter because it was moot. We adopt the position taken by Anne in her letter to the trial court that "the motion has become moot because the ninety-day period imposed by the case worker has now elapsed and in any event, there has been no supervised visitation imposed for numerous weeks." A reviewing court will usually decline to decide moot issues. ***State ex rel. Wis. Envtl. Decade, Inc. v. Joint Comm.***, 73 Wis.2d 234, 236, 243 N.W.2d 497, 498 (1976).[4] We see no reason to address this moot issue.

[4] As a consequence, Anne's arguments that the failure of the court to hold a hearing before the case manager instituted the order violates her due process rights; that the trial court's order was an improper delegation of the trial court's authority to a third party; that the order is an unlawful prospective custody order; that the matter of supervised visitation was not properly before the court because no motion had been filed alerting her to the possibility; that no evidence was presented establishing that she posed a physical or emotional risk to the children; and finally, that the order was excessively broad and vague, will not be addressed.

As noted, Anne is also appealing the reserve judge's decision requiring her to contribute to Paul's attorney fees. At the hearing, Paul presented evidence of his outstanding attorney fees which he claimed were generated by Anne's most recent motion to change custody and placement. Paul also produced an expert witness, Attorney Ronald Jaskolski, a family lawyer, who testified that not only were the attorney fees reasonable, but also, in his opinion, after reviewing the entire record of the parties' litigation, he believed Anne had been guilty of overtrial. The expert witness stated he came to this conclusion primarily because of Anne's decision to bring the most recent motion requesting a change in the custody and placement order. He testified that this last motion was improper because the motion failed to contain allegations which meet the required statutory burden of a substantial change in circumstances, a necessary prerequisite before the court could lawfully change the custody and placement order. Further, he testified that Anne should not have brought this motion while her earlier custody motion was on appeal.

The oft-cited case dealing with overtrial in family court is ***Ondrasek v. Ondrasek***, 126 Wis.2d 469, 377 N.W.2d 190 (Ct. App. 1985). In ***Ondrasek***, this court affirmed the trial court's determination that Ondrasek had overtried the matter and required him to contribute $5,000 to his wife's attorney fees. We recited the general rule that "[t]he award of contribution to attorney fees rests within the discretion of the trial court and will not be altered on appeal unless an [erroneous exercise] of discretion is shown," ***id.*** at 483, 377 N.W.2d at 196, and also defined "overtrial" as the act of causing needless days of trial and extra preparation, ***id.*** (relying on ***Martin v. Martin***, 46 Wis.2d 218, 174 N.W.2d 468 (1970), *overruled on other grounds by* ***O'Connor v. O'Connor***, 48 Wis.2d 535, 180 N.W.2d 735 (1970)). We also noted that "the manner in which the case was

handled created extremely high costs" and "[a]s a matter of sound policy, an innocent party who is the victim of 'overtrial' should not be burdened with the payment of extra and unnecessary attorney fees occasioned by the other party." ***Id.*** at 484, 377 N.W.2d at 196.

Here, the trial court found that Anne's second motion seeking a change of placement and custody was "a rehash." The trial court also determined that no substantial change of circumstances was shown and that "[s]he's [Anne] put the Court, she's put the lawyers, the guardian ad litem through undue expense in attorney fees …." The trial court also opined, "this last motion in my mind should have never been brought under any circumstances." Finally, the trial court concluded that the fees that were incurred by Paul in defense of the motion were unnecessarily incurred as a result of the litigation that was presented to the court. "I find that the respondent was put to a considerable portion of his attorney fees liability because of his [sic] nature in which the petitioner pursued the litigation. I further find that petitioner has overly tried as a matter of course and needless days of extra preparation were incurred as a result …." The trial court's exercise of its discretion was proper when it determined that Paul was forced to incur significant attorney fees because of Anne's actions.

The record reveals extensive legal activity since the contested divorce trial. Anne's motion asking the trial court to reconsider its trial finding concerning custody and placement was filed in November 1994, adjourned either four or five times, and finally heard in August 1995. Following the denial of that motion to reconsider, Anne brought another motion asking for a change of custody and placement while the earlier order was still on appeal to this court. Thus, in addition to the original litigation of the issue of custody and placement at trial,

Anne brought two motions involving custody and placement of the children in a span of just over two years.

A request for a post-divorce modification of a custody or placement order is governed by § 767.325, STATS. Pursuant to § 767.325(1)(b)1b, before the court can grant a request to modify the order of custody and physical placement, the court must find, *inter alia*, that "[t]here 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." Anne failed to meet this burden.

As Paul's expert witness aptly observed, "There was an appeal pending. There was no allegation contained in this affidavit or motion stating there's a substantial change in circumstances. There's no new ground to change it. It [the motion] appeared to be a rehashment of what had already been decided." He also stated, "There was no immediate necessity to change placement and custody as alleged in the affidavit other than an affidavit that states for years there were problems." After reviewing the record we agree that Anne's voluminous motion and affidavit did not contain any new information which would constitute a substantial change of circumstances. Not only did Anne's motion fail to specify a substantial change of circumstances at the second post-judgment motion hearing seeking a change of custody and physical placement, but also at the hearing it was revealed that Anne was in possession of two reports when she brought her motion, one from a psychologist and the other from the case manager, both of whom recommended no change in custody or placement. Additionally, many of Anne's allegations concerning the children's condition were proved false.

The modification statute requires a party to show both that the modification would be in the best interest of the child and that a substantial change in circumstances has occurred since the last order was entered. Section 767.325(1)(b)1a & b, STATS. It is axiomatic that the legislature's decision to require a high degree of proof before a change can be made to an existing custody and placement order was intended to bring stability to the lives of children whose parents had divorced. The trial court found that Anne's attempts at changing custody had a detrimental effect on the children as she focused her energies on having the order changed rather than facilitating its implementation. Further, her conduct undeniably resulted in a huge drain on the financial resources of both parties, a condition adversely affecting the children.

Anne's claim that she felt she was directed to bring the motion by the reserve judge's comments concerning the future primary placement of the children with her has little merit. The trial court's remarks, while possibly inappropriate and misleading, nevertheless, were not embodied in the written order and, in any event, the trial court does not have the authority to alter the statutory requirements for a change in custody and placement. Thus, we conclude that Anne's bringing the second motion seeking a modification of the custody and placement order did constitute overtrial. She neither alleged nor proved that a substantial change of circumstances had occurred. Despite her failure to allege a substantial change in circumstances, she improvidently brought her motion while her first motion seeking to overturn the trial court's denial of her request for custody and placement modification was still on appeal.

On December 16, 1996, the trial court also heard a motion brought by the guardian ad litem seeking payment of his outstanding fees from Anne. The guardian ad litem claimed that fees in the amount of approximately $2,400 were

owed to him. The guardian ad litem explained that he had previously agreed to be paid $75 per month by Anne, but he claimed he reached this agreement when he was unaware that Anne would be receiving a $23,000 settlement from the sale of the family home, and he entered into the agreement before Anne brought her last motion seeking a change in custody and placement which generated even more fees.

Anne's objection to the guardian ad litem's request was based on her testimony that the entire $23,000 went for the purchase of a new home and she was unable to pay more. As a result of her statements, the trial court ordered Anne to provide documentation to the guardian ad litem of the house purchase within five days. On December 23, 1996, the guardian ad litem advised the court that the documentation had never been provided. Anne's counsel argued that the reason he failed to produce the documents was because the seller did not wish the unrecorded land contract to be seen by others. He also admitted that, contrary to Anne's testimony, the land contract was for $20,000, not the $23,000 Anne had declared earlier. At this hearing Anne changed her testimony. She now claimed that the remaining money, approximately $3,000, was paid to her parents for miscellaneous expenses related to the move, for which she had no receipts. After hearing this explanation, the trial court ordered Anne to pay the guardian ad litem $2,400 within seventy days or the guardian ad litem could apply for a default judgment in that amount plus costs, interest and attorney fees. Anne now seeks to overturn the trial court's order because the trial court failed to make a finding that the total guardian ad litem fees were reasonable or that she had the ability to pay the guardian ad litem $2,400. We are not persuaded.

As noted, the award of attorney fees is within the discretion of the trial court. No objection was ever raised to the amount of the guardian ad litem's

fees. In fact, the dispute revolved solely around the repayment method. At the hearing, the guardian ad litem argued that he felt it unfair for him to wait for his fees and receive only $75 a month when Anne had at her disposal $23,000. He stated, "I'm still litigating this case because of Anne Gerard and I feel it's unconscionable that she has not paid me my money when she got $23,000 …." While the trial court did not specifically state that Anne had the ability to pay, it is implicit in the trial court's order. After testifying that she spent the entire $23,000 purchasing a new home, Anne subsequently presented questionable documentation (which she would only permit the judge to see) that the house cost her only $20,000. Her explanation for the remaining $3,000 was also suspect, as it differed from her earlier explanation, and this new explanation was neither documented nor verified. It is apparent that the trial court found the explanation for the missing documentation and the whereabouts of the money incredible. Under these circumstances, the trial court properly exercised its discretion in determining that the guardian ad litem should be paid $2,400 within seventy days.[5]

Finally, we note that Paul has filed a motion asking this court to hold that Anne's appeal is frivolous and to award him the costs, fees and reasonable attorney fees pursuant to § 809.25(3).[6] In response, Anne has asked us to award

[5] Anne has suggested in her reply brief that since the guardian ad litem declined to file a brief in this matter, "[l]itigants cannot complain if propositions of appellants are taken as confessed which litigants do not undertake to refute," citing ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). We note that the respondent has addressed the issue on behalf of the guardian ad litem and under these unusual circumstances we will not penalize the guardian ad litem for his decision not to file a brief when, to do so, would only generate additional fees. The only issue concerning the guardian ad litem's fees is the time period for repayment and the respondent has responded adequately to the arguments presented.

[6] Section 809.25(3), STATS., provides:

> **(3)** FRIVOLOUS APPEALS. (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the

(continued)

her all her fees expended in responding to the frivolous motion request as she claims the bringing of the motion seeking frivolous fees was, itself, frivolous. We decline both invitations.

Section 809.25(3)(c)2, STATS., states that an appeal is frivolous if "[t]he party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law." With regard to Anne's appeal, we have determined that one of the claimed errors was moot, but Anne's claim that the trial court erred in finding she overtried her motion, while decided against her, was nonetheless decided on the merits. We are also mindful of the fact that the issue of "overtrial" is a rare finding, and there is little case law dealing with the issue particularly in this

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> successful party costs, fees and reasonable attorney fees under this section. A motion for costs, fees and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is filed, the cross-respondent's brief.
>
> (b) The costs, fees and attorney fees awarded under par. (a) may be assessed fully against the appellant or cross-appellant or the attorney representing the appellant or cross-appellant or may be assessed so that the appellant or cross-appellant and the attorney each pay a portion of the costs, fees and attorney fees.
>
> (c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
>
> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

context. Further, Anne's final claim that the trial court erroneously exercised its discretion in ordering the lump sum payment to the guardian ad litem arose under unusual circumstances. Again, while Anne has not persuaded us, there was a reasonable basis for her argument. Thus, we cannot find that the entire appeal falls within the category of a frivolous appeal as defined by the statute as there was a reasonable basis in law and equity for several of the issues addressed by Anne.

As to Anne's request that we find Paul's motion seeking frivolous costs frivolous, since Paul's position was that several of the issues raised in this second appeal were either not well developed or, possibly, waived or moot, it was not wholly unreasonable for Paul to conclude that he was entitled to § 809.25, STATS., motion costs. Thus, we determine that Paul's motion was not frivolous. As a result, Anne's request is also denied.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

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SCHUDSON, J. *(concurring in part; dissenting in part).* I agree with most of the majority's analysis. I write separately, however, to express (1) my disagreement with the majority's conclusion that the trial court correctly determined that Anne overtried the case; and (2) my agreement with Anne's argument that the trial court's gender bias deprived both parties of a fair hearing – an argument the majority has not addressed.

I. OVERTRIAL

As Anne has summarized her argument, her "position is quite simple" on the issue of whether she overtried this case:

> If a court informs a party a child's best interests will be served by returning primary placement to her after she passes a psychological evaluation and the court then establishes a time frame for the evaluation – and it is undisputed that this is exactly what the trial court did in this case – how can the same court then determine she is overlitigating when she comes back after successfully passing the psychological evaluation with a request for a return of primary placement?

This is a fair question.

Further, in a somewhat related argument, Anne maintains that not only did she not overlitigate this case, but that the trial court improperly prevented her from presenting her case by, among other things, limiting her testimony to fifteen minutes and denying her request to call her psychotherapist as a witness. Clearly, notwithstanding his lack of a degree in psychology (the basis for the trial

court's exclusion of his testimony), Anne's therapist could have addressed a number of material issues.

On this issue, Anne's arguments are reasonable, Paul fails to refute them, and, although the majority discusses this issue in some respects, it fails to directly address Anne's specific arguments.

II. GENDER BIAS

Denying Anne's motion, the trial court began its decision by saying:

> All right. Well, the Court has sat here patiently for I don't know how long, hours today, and months and two years, I think, was the first time I came into this case, and I remember saying at one time someplace in these proceedings, I don't remember where or when, that *I always felt that a woman should have custody of the children if all things were equal, that no man, including me, could substitute the love of a woman and mother towards her children and I meant every word of that.*
>
> *It's not my intention at any time to take away the children from any mother and I told you people, I tried this as an unusual way. I only took this case on the conditions that you did it my way, as Frank Sinatra's song goes.*

(Emphasis added.)

As Anne points out, the trial court articulated a bias in favor of women, contrary to: (1) § 767.24(5), STATS., which provides, in part, "The court may not prefer one potential custodian over the other on the basis of the sex … of the custodian"; and (2) § 766.97(1), STATS., which provides, in part, "Women and men have the same rights and privileges under the law in the exercise of … care and custody of children …."

Anne acknowledges that "one's knee-jerk reaction would be to imagine this bias could only have benefitted [her] and therefore constitutes

harmless error." Nevertheless, she contends that the trial court's emphatically expressed gender bias "skews the baseline neutrality which is supposed to be the hallmark of a judicial proceeding and thereby has a prejudicial effect on all of the parties involved." I agree.

Somewhat ironically, a trial court's bias favoring women can be prejudicial to a woman in at least three ways. First, if, for example, the bias were based on the trial judge's conception of a "traditional" woman, other women who might not match the judge's aproned-image of women would suffer prejudice. Second, if the judge were particularly concerned about his or her own potential unfairness resulting from gender bias, the judge might very well "bend over backwards" to correct against it, thus improperly reducing a woman's chances to gain custody. Third, if the judge indeed did favor a woman and award her custody because of this gender bias, the decision, improvident and inconsistent with the best interests of the child, ultimately could be damaging to the woman's long-term relationship with her child.

I recognize that Anne failed to object or move for recusal or disqualification of the trial judge. *See* ***Pure Milk Prods. Coop. v. National Farmers Org.***, 64 Wis.2d 241, 249, 219 N.W.2d 564, 569 (1974) (challenge to a judge's right to adjudicate a matter must be made as soon as the alleged infirmity is known and prior to the judge's decision on a contested matter). *See also* ***State v. Marhal,*** 172 Wis.2d 491, 505-06, 493 N.W.2d 758, 765 (Ct. App. 1992). Here, however, where the trial court first reveals and emphatically reiterates its gender bias as the preface to its final decision, and where the trial court, 'doing it my way' throughout the proceedings, produces a record that is as convoluted as this one, I am satisfied that *neither* party received a fair hearing, *both* parties suffered

prejudice and, therefore, the trial court may not have properly accounted for the best interests of the two children.