COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 01-0616-FT

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

IN RE THE MARRIAGE OF:

JULAINE M. KINNARD F/K/A JULAINE M. KINNARD-KINZIGER,

PETITIONER-APPELLANT,

V.

PETER R. KINZIGER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for LaCrosse County: MICHAEL J. MULROY, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Julaine Kinnard appeals from an order transferring primary physical placement of the parties' six-year-old daughter Walker from

Kinnard to her ex-husband, Peter Kinziger. Kinnard argues that the trial court erroneously exercised its discretion by refusing to grant a continuance after the guardian ad litem introduced surprise evidence. We agree and therefore reverse the placement order with directions that the trial court reopen the matter to allow Kinnard to present additional evidence.

BACKGROUND

¶2 This case has a long and involved history. Because one question before the court is whether any surprise evidence was "unfair," some background facts are necessary to put the current dispute into context. Kinnard and Kinziger were divorced on February 3, 2000, following several years of litigation dealing in large part with custody of Walker. While the divorce was pending, Walker made statements and gestures at her daycare which indicated that she had seen her father masturbating. She made subsequent allegations to daycare personnel, her therapist, her mother, and several investigators that her father had "touched her icky" in her vaginal area, that he had "peed" on her, that he had put his "tail" into her butt and she did not like it, that her father was mean, and that she wanted a new father. Various observers described Walker as sad or fearful as she made these disclosures, and nonresponsive to questions about them. Walker also touched her teacher's crouch, masturbated in public, drew pictures of herself and her father in bed and having sexual relations in the living room, and drew and cut out "tails" in therapy sessions.

¶3 Dr. Beverly Bliss, an expert appointed to evaluate the allegations in the context of a custody study, noted that several of the county investigators had described abuse as "probable, but unable to be substantiated" due to Walker's age and the lack of physical evidence. Bliss concurred in that assessment, but

considered it unsurprising that Walker would shut down when asked about the incidents, given the number of evaluations to which the child had been subjected. She further noted that Walker "has learned over the years to not talk about one house when in the other and vice versa. She essentially lives separate lives in her parents' homes."

¶4 Bliss observed that many of Walker's disclosures had been made spontaneously to third parties in play situations, in response to hearing or seeing something that triggered an association, rather than in response to questions. She pointed out that Walker's allegations had remained remarkably consistent for over a year, rather than escalating into increasingly fantastic stories, as is common with false allegations. Bliss also noted that it would be normal for Walker to have little additional detail to offer if she were describing events that had happened when she was two or three years old, but were no longer occurring. Bliss found no indication that Kinnard was coaching Walker to make false allegations, as Kinziger had asserted, but rather concluded that Kinnard sincerely believed her daughter's allegations and was upset and frustrated that the system was not treating the allegations seriously enough.

¶5 Bliss described Kinziger as "controlling" generally, and "hostile, demeaning and blaming" with Kinnard. She noted that he had "relentlessly pursued" access to Walker by repeatedly attempting to discredit Kinnard as mentally ill — an allegation which Bliss noted was not supported by the psychological profiles which were conducted. Kinnard was an admitted alcoholic, but had been sober for twenty years by the time of the divorce. Bliss appeared to credit Kinnard's claim that Kinziger had threatened to kill her, noting that even Walker had expressed to her daycare providers a belief that her father was going to kill her mother. Bliss also pointed out that Kinziger had disregarded court orders

to refrain from contacting Kinnard following a domestic abuse incident, to refrain from unsupervised contact with Walker during the sexual abuse investigation, and to refrain from contacting Walker's daycare after daycare officials had complained about his behavior, including taking pictures of other children after daycare officials had told him to stop.

¶6 The supervisors who witnessed placement exchanges during the divorce reported that Kinziger would scream at Kinnard, repeatedly calling her crazy in front of Walker, and, on at least one occasion telling Kinnard he would see her bankrupt. Kinziger was frequently fifteen to forty-five minutes late for the exchanges, and would sometimes refuse to give Walker over to the designated supervisors, instead insisting on contact with Kinnard. On several occasions he ignored information about Walker's medications or future schedules.

¶7 Bliss recommended that Kinnard be granted sole custody and primary physical placement, and that Kinziger be enjoined from contact with Kinnard or with Walker's school, with limited exceptions. She also suggested that a mechanism for the investigation of future allegations of sexual abuse should be set up, wherein Kinziger's visitation schedule would be suspended. Shortly after Bliss made her recommendation, the parties agreed to joint custody with Kinnard having primary physical placement.

¶8 Several months after the divorce, Kinnard brought to the attention of Walker's therapist, Dr. Beth Corey-Taylor, another allegation by Walker of sexual abuse. After interviewing Walker, Corey-Taylor informed Kinnard that she did not believe there was anything to report. Kinnard nonetheless filed a complaint with the Winnebago County Department of Human Services. The department was once again unable to substantiate that abuse had occurred.

¶9 Kinziger then filed a motion asking to have Kinnard held in contempt for denying his placement rights and to have primary physical placement transferred to him on the grounds that Kinnard was attempting to alienate Walker from him. The guardian ad litem retained social worker Monica Lazere to meet with Walker. Lazere had been involved in the original divorce proceedings prior to Bliss' appointment.

¶10 Kinnard deposed Lazere one week before the scheduled hearing, and subpoenaed all of her records relating to Walker. Lazere said she had met with Walker on four occasions after the divorce. Walker had played house during three of the sessions, and Lazere noted a recurring theme wherein the mother was sick and the father came and rescued the mother and child or children. Lazere said that Kinnard's decision to move during the divorce had given her some concern that Kinnard might be attempting to alienate Walker from Kinziger, but that she saw no current evidence of parental alienation. She viewed Walker as a reasonably well-adjusted, resilient child who was functioning well under difficult circumstances, compartmentalizing to deal with stress. Lazere also said she had spoken with Walker's therapist, and that nothing Corey-Taylor told her gave her any reason for concern.

¶11 At the hearing Kinziger introduced Corey-Taylor's notes into evidence over Kinnard's objection that the notes had not been turned over to her. The guardian ad litem explained to the court that Lazere had not had the opportunity to review Corey-Taylor's notes until after the deposition. According to the notes, Walker told Corey-Taylor more than once that she had lied to her mother about her father touching her "icky" during recent placements. Walker indicated that she had to pretend that her dad touched her "icky" when she was with her mother, because she did not want her mother to know that she did not

think her father was mean. Lazere testified she was surprised that Corey-Taylor had not mentioned anything of this nature during their conversation. Lazere then testified, also over Kinnard's objection, that a child who was asked to hide feelings of love for one parent was at risk for emotional harm.

¶12 In explaining its decision not to exclude the notes or the testimony based upon them, the trial court pointed out that there was not enough time to finish the hearing that day, and it presumed that Kinnard would be able in the ensuing week, before the hearing was scheduled to resume, to speak with Corey-Taylor or subpoena her and look at the notes in more detail.

¶13 When the hearing resumed, however, Kinnard informed the court that she had not been able to contact Corey-Taylor, who was out of the office over the Thanksgiving holiday. Kinnard asked for an additional continuance. The trial court denied the motion, stating:

> Well, you know, this was anticipated to be done in a day. It is now into the second day, anticipating that we are going to finish today. I think there needs to be some finality, at least, and the way this litigation has been going its going to be on an interim basis because I have no doubt that two, three, four months down the road, irrespective of what my position is, the other side is going to have a motion to have whatever order is entered modified because of some change of circumstances and that's just the nature of this case, which is the nature of the beast. So at least at this particular point, the motion for a continuance is denied.

The trial court proceeded to transfer custody to Kinziger, relying heavily on Corey-Taylor's notes, and Kinnard appeals.

STANDARD OF REVIEW

¶14 The decision whether to grant a continuance rests within the discretion of the trial court. ***Allen v. Allen***, 78 Wis. 2d 263, 274-75, 254 N.W.2d 244 (1977). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

ANALYSIS

¶15 WISCONSIN STAT. § 804.12(4) (1999-2000)[1] allows the trial court to exclude evidence as a sanction for the failure to seasonably amend a deposition response when obligated to do so.[2] In addition, Wisconsin adopted a rule permitting the trial court to exclude any evidence which unfairly surprises a party if the prejudice to the party outweighs the probative value of the evidence. ***Whitty v. State***, 34 Wis. 2d 278, 294, 149 N.W.2d 557 (1967). However, the preferred remedy for surprise is to grant a continuance. ***Fredrickson v. Louisville Ladder Co.***, 52 Wis. 2d 776, 784, 191 N.W.2d 193 (1971). Exclusion should be used only when continuance would result in a lengthy delay in the proceedings. ***Jenzake v. City of Brookfield***, 108 Wis. 2d 537, 543, 322 N.W.2d 516 (Ct. App. 1982).

¶16 Here, the trial court made no explicit findings as to whether Lazere was under a duty to amend her deposition responses or supplement the records she

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] WISCONSIN STAT. § 804.01(5)(b) requires a party to seasonably supplement or amend a prior response to a discovery request "if the party obtains information upon the basis of which … the party knows that the response was incorrect when made, or … the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." Although, on its face, this provision applies only to parties, the same rule has also been applied to expert witnesses who are under a party's control. ***State v. Pletz***, 2000 WI App 221, ¶24, 239 Wis. 2d 49, 619 N.W.2d 97.

had turned over, or whether Corey-Taylor's notes and Lazere's testimony based upon them constituted unfair surprise. However, because the trial court's reasoned that the necessary set-over in the proceedings obviated the need to exclude the evidence, we infer that the court was in fact treating the notes and testimony as surprise evidence.

¶17 Kinziger asserts that any surprise involved was not "unfair," because Lazere did not have the notes to turn over to Kinnard at the time of her deposition, and Kinnard could have independently obtained the notes at any time. We consider this assertion somewhat disingenuous given the prior history of the case, which included an order limiting access to Walker's therapy records to the guardian ad litem in order to prevent the parents from interfering in Walker's therapy. While Kinziger may be correct that the order was no longer in effect by the time of the hearing, even the guardian ad litem acknowledged that there was an informal understanding that Corey-Taylor would not be subpoenaed to testify because Corey-Taylor did not want to undermine her therapeutic relationship with Walker by being asked to assume the role of an evaluator. Furthermore, Lazere had specifically stated during her deposition that nothing in her conversation with Corey-Taylor caused her concern. Under these circumstances, Kinnard could not reasonably have anticipated that the guardian ad litem would present Corey-Taylor's treatment notes, or that there was anything in them which would have changed the opinion Lazere held just one week before the hearing with respect to evidence of parental alienation.

¶18 Kinnard acknowledges that the trial court could reasonably have decided to give her time to deal with the notes and Lazere's testimony rather than excluding them. She argues, however, that the trial court erroneously exercised its

discretion when, after admitting the surprise evidence, it refused to extend the continuance at least until after Corey-Taylor returned from vacation. We agree.

¶19 We note, first of all, that the trial court failed to address the proper factors when denying the additional continuance. It cited the importance of concluding the matter that day without even discussing the potential prejudice to Kinnard. An examination of the record and the facts related above demonstrates that the potential prejudice was substantial.

¶20 First of all, Kinnard was given no opportunity to clarify what significance Corey-Taylor placed on Walker's statements. For instance, did she believe that the statements reflected that no abuse had *ever* occurred, or that Walker had fallen into a pattern of reiterating her allegations to conform with her mother's expectations even after the abuse had stopped, or that Walker was denying the truth of the statements she had made to her mother in order to avoid telling an outsider about continuing abuse? Did Corey-Taylor believe that Kinnard was deliberately coaching Walker to make false accusations, or did she believe that Walker was making up the recent allegations on her own and that Kinnard sincerely believed her? If Corey-Taylor did think that Kinnard was engaging in alienating behavior, did she believe that she was the only parent doing so? Would she consider Lazere's report that Walker was consistently referring to her play mothers as sick and fathers as rescuers as evidence that Kinziger was continuing his campaign to paint Kinnard as sick and crazy and himself as her caretaker? Clarification of Corey-Taylor's position would seem to be particularly important given the emphasis which the trial court placed on the notes and the fact that even Lazere was surprised that Corey-Taylor did not comment on this issue during their conversation.

¶21 Kinnard was also prejudiced in her ability to obtain expert opinion to rebut Lazere's interpretation of the notes without first having Corey-Taylor's explanation of them. For instance, in her custody evaluation, Bliss had noted that Walker lived separate lives in each parent's home. Would Walker's statements have been consistent with Bliss's prior observations, or would they have changed her recommendation that Kinnard should have sole custody of Walker? Assuming that Walker's statements did reflect parental alienation, did this outweigh the evidence of Kinziger's "probable" but unsubstantiated sexual assault of Walker when she was two or three years old, or his refusal or inability to follow court orders, school rules, and medical directions designed to protect Walker and others? In order to answer questions such as these, it may have been necessary for Bliss, or some other expert of Kinnard's choosing, to discuss Corey-Taylor's observations with her in more detail.

¶22 In sum, we conclude that the introduction of Corey-Taylor's notes and Lazere's testimony based upon them unfairly surprised Kinnard. The trial court could have chosen to exclude the notes and testimony. Having admitted them with the understanding that Kinnard would be given an opportunity to discuss the notes with Corey-Taylor before the hearing resumed, the trial court failed to give a reasonable explanation for denying an additional continuance to achieve that result. We therefore reverse the order transferring primary placement of Walker from Kinnard to Kinziger and remand with directions for the trial court to reopen the evidence and to allow Kinnard to address the issue of Corey-Taylor's notes.

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

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