STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2017AP000414
Circuit Court Case No. 2008-FA-007027

In re the Marriage of:

HERBERT RAYMOND GLIDEWELL,

Petitioner-Respondent,

v.

JILL IRENE RILEY
(f/k/a Jill Irene Glidewell),

Respondent-Appellant.

ON NOTICE OF APPEAL FROM A FINAL CUSTODY ORDER ENTERED IN
THE CIRCUIT COURT OF MILWAUKEE COUNTY,
THE HONORABLE PAUL R. VAN GRUNSVEN PRESIDING.

REPLY BRIEF OF RESPONDENT-APPELLANT

Submitted by:
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I. RESPONDENT-APPELLANT'S REPLY TO STATEMENTS OF FACT BY RESPONDENT AND GUARDIAN AD LITEM

To the extent necessary to clarify her forthcoming reply arguments, the Respondent-Appellant, Jill I. Riley ("Jill") replies to the facts stated by the Petitioner-Respondent, Herbert Glidewell ("Herb") and the Guardian ad Litem ("GAL") as follows:

The GAL notes that the two doctors who have indicated to Jill that the current custodial arrangement is not in the children's best interests were not present in court to testify on December 12, 2016. *GAL Brief-in-chief, p. 5*. It is worth noting that the reason they were not present is that the matter was scheduled for a Status Conference before the court following the parties' pretrial submissions. The doctors were both listed as witnesses on Jill's Witness List. R. 230.

Jill was not present at the hearing due to the death of her father. Rather than proceeding with the selection of a hearing in which testimony from witnesses could be elicited, the court ruled based on the parties' respective pretrial submissions and the statements of counsel on December 12th. R. 281.

Another issue that should be clarified is that there was not a stipulation between the parties as to what the

testimony of their witnesses would be. Such a stipulation would have allowed the court to rule on the admissibility of the testimony witnesses without conducting a hearing. *Stuligross, 316 Wis.2d 344, 351, 763 N.W.2d 241, 245 (Ct. App. 2008)*.

Finally, although there is referenced to a report written by Dr. Alison Kravit being made part of the "record" in this case *(see R. 281 at 26)*, that report was not included in the record submitted to this Court.

II. REPLY ARGUMENTS

A. A De Novo Hearing, as defined by Wis. Stat. § 757.69(8), was not Conducted

Both Herb and the Guardian ad Litem attempt to draw factual distinctions between this case and the *Stuligross* case to support the argument that the holding in *Stuligross* does not apply to this matter. *Resp. Brief-in-chief, p. 9; GAL Brief-in-chief, p. 10.* However, regardless of the factual distinctions between the two, the holding in *Stuligross* is that "the plain meaning of Wis. Stat. § 757.69(8), specifically the phrase "hearing de novo", required the trial court to afford Stuligross an opportunity to present testimony at the hearing." *Stuligross, 316 Wis.2d 344, 351, 763 N.W.2d 241, 245.* A *de novo* hearing requires a fresh look at the issues, **including**

the taking of testimony (unless the parties stipulate as to what the testimony would be). *Id.* It is interesting that the citations to *Stuligross* in the Guardian ad Litem's brief completely omit the Court's language regarding "testimony". *GAL Brief-in-chief, p. 12-13.*

The commonly accepted meaning of testimony is "evidence of a witness; evidence given by a witness, under oath or affirmation; as distinguished from evidence derived from writings, and other sources. Testimony is not synonymous with evidence. It is but a species, a class, or kind of testimony." BLACK'S ONLINE LEGAL DICTIONARY 1151 (2nd ed.2017).

In this case, much is made of the "wealth of information before the trial court in this matter. *GAL Brief-in-chief, p. 12.* While the court did review the submissions of all parties and listen to the stories of counsel, the information considered by the trial court does not include actual testimony from anyone. Instead, the "facts" were derived from only those materials included with the parties' pretrial submissions, including "briefs" with no citations to facts in the record *(See R. 233, 234, 235)* and the arguments of counsel. While the written submissions told each parties' story in the context of their respective legal positions, there is nothing in the

record to suggest that they were intended to supplement the testimony of witnesses.

Deciding this matter solely on those submissions is similar to a movie critic writing an impassioned review after watching the ninety-second trailer. More importantly, doing so is contrary to the right of a litigant to present testimony at a de novo review hearing, as required by Wis. Stat. § 757.69(8). To the extent that Herb or the Guardian ad Litem argue that the December 12, 2016 hearing constitutes a de novo hearing, Jill respectfully argues that such a hearing must include the testimony of witnesses, as sec. 757.69(8) is interpreted by the *Stuligross* Court.

B. Footnote Eight (8) of *Stuligross* does not Give the Trial Court Discretion to Disregard the Rules of Evidence.

Herb and the Guardian ad Litem concur in the trial court's conclusion that footnote eight (8) of the *Stuligross* decision stands for the proposition that a de novo hearing need not be an evidentiary hearing. *GAL Brief-in-chief, p. 13*. The footnote states:

> we do not suggest that the trial court is required to hear any and all testimony offered by either party. Trial courts have discretion to limit the introduction of evidence pursuant to the Wisconsin Rules of Evidence. *Stuligross at Footnote 8.*

It is understood that the circuit court has broad discretion in making evidentiary rulings. *State v. Oberlander*, 149 Wis.2d 132, 140, 438 N.W.2d 580 (1989). As with other discretionary determinations, the Court of Appeals will uphold a decision to admit or exclude evidence if the trial court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. *Glassey v. Cont'l Ins. Co.*, 176 Wis.2d 587, 608, 500 N.W.2d 295 (1993).

The Court of Appeals will not find an erroneous exercise of discretion if there is a rational basis for a circuit court's decision. *State v. Hammer*, 2000 WI 92, ¶ 43, 236 Wis.2d 686, 613 N.W.2d 629. However, for a discretionary decision of this nature to be upheld, the basis for the court's decision should be set forth. *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983). If the circuit court fails to provide reasoning for its evidentiary decision, this court independently reviews the record to determine whether the circuit court properly exercised its discretion. *Id.* at 343, 498.

In this case, the parties each submitted witness lists with brief statements as to the anticipated testimony of each witness. R. 228, 229, 230. However, the record is devoid of the trial court’s reasoning in excluding the

testimony of those witnesses named by Jill in her pretrial submissions. The court briefly references his review of a report provided to him prior to the hearing, authored by Dr. Alison Kravit, saying only that he "had trouble with what Ms. Kravit says" in her report. R. 281 at 22. Instead, the court relied on the children's report cards as a basis to make various findings that the children are "thriving" at school. Ironically, Dr. Kravit would testify regarding her concerns that Kayla's current grades and social interactions may mask the current and future levels of potential impairment resulting from her lack of speech at school. R. 234 at 4. In addition, Dr. Kravit would testify regarding her personal observations of difficulty implementing services for the children at Cooper Elementary as a result of the parents' discord. Id.

Certainly, a professional opinion regarding the impact the current custodial arrangement is having on the children is relevant to this case. If Dr. Kravit's testimony was excluded because the court deemed it irrelevant, or because she lacked the qualifications to render an opinion, or for any other reason within the Rules of Evidence, that record needs to be made. The exclusion of Dr. Kravit's testimony is only one example.

Instead, the court referenced only those submissions that were relied upon in rendering his decision and interpreted footnote 8 of *Stuligross* to mean that the trial court can pick and choose which submissions to adopt as facts and render a decision that excludes all other evidence without application of the Rules of Evidence.

If footnote 8 is interpreted as it was applied by the trial court in this matter, evidentiary hearings would no longer be necessary and the Court of Appeals would never need to review a trial court's decision regarding evidentiary rulings. Rather, the trial 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.

That simply cannot be the message sent by this Court in footnote 8. Rather, Jill respectfully argues that the footnote is meant to affirm the trial court's authority to make evidentiary rulings consistent with the Rules of Evidence. To that extent, there is no basis in the record to exclude Jill's witnesses and, thus, the record for denying her a de novo hearing is incomplete.

C. Not Objecting to the Introduction of School Records does not Impact Jill's Argument

In his brief, Herb finds it "noteworthy" that Jill did not object to the introduction of school records through Herb's counsel. *Resp. Brief-in-chief, p. 8.* Apparently, the insinuation is that allowing the court to use those records in rendering his decision on December 12, 2016 waives any objection Jill has to the court's sole reliance on the school records as a basis to dismiss her request for a de novo hearing.

Such a conclusion neglects the fact that Jill's entire argument was centered around her right to present testimony at a hearing. R. 234 at 4. In reality, based on the witnesses named on Herb's Witness List (*See R. 228 at 1-2)* there is little doubt that the appropriate foundation would have been laid for the records to be properly moved into evidence. Alternatively, even without the proper foundation, the records could be moved into evidence as a record of regularly conducted activity pursuant to Wis. Stat. § 908.03(6). The point being, the objection is not to the inclusion of the school records, as they are certainly a relevant part of the equation.

Rather, the objection is to the restriction of the record to only the school records and commentary regarding a doctor's report in making the decision to dismiss Jill's request for a de novo hearing. Jill's position regarding her right to a hearing, with testimony from witnesses, was clear in her pretrial submissions. R. 234 at 2. It was also clear that everything being submitted to the court was in anticipation of an evidentiary hearing. Id. at 3, 4, 5 (*with reference to validity of professional reports if moved into "evidence").* Even if Dr. Kravit's report is considered part of the "record", that does not change Jill's right to call Dr. Kravit as a witness to testify in more detail about the content of her report.

Jill's request for an opportunity to present her case has been clear throughout. Not objecting to the court considering school records does not change her position that she is entitled to present her own testimony to refute the value of those records. Ultimately, this appeal is less about what is in the "record" and more about what has been excluded.

III. CONCLUSION

Based upon her foregoing arguments, the Respondent-Appellant respectfully asks that the court reverse the trial court's ruling and remand the matter back to the circuit court to conduct a de novo hearing, as defined in Wis. Stat. § 757.68(9).

Respectfully Submitted,

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CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a reply brief produced with a monospaced font. The length of this reply brief is ten (10) pages. No unpublished decisions were cited in this Reply Brief and no appendix is included.

I hereby certify that an electronic copy of this reply brief was submitted, which conforms to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the reply brief is identical to the text of the paper copy of the reply brief.

A copy of this certification was included with the paper copies of this Reply Brief filed with the Court and served on all interested parties.

Signed,

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