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Child Testimony in Family Law Cases:

Justifying a Decision

Attorneys and parties in divorce cases involving minor children are likely to face resistance if they attempt to have those children testify at trial. This discussion of the status of the law in Wisconsin suggests ways that children's thoughts about relevant issues in their parents' cases can be conveyed to the court.

Recently, I had the opportunity to engage with several judges at the Wisconsin Judicial College regarding the issue of children testifying at trial in contested custody and placement matters. Although no formal vote was taken, the consensus seemed to be that if one party continued to press, the court may be compelled to allow the child to testify.

When this issue arises, it appears that most magistrates in Wisconsin find some way to make it go away. Perhaps they do so by discouraging the parent by telling them that they should be ashamed of even suggesting that their child should testify in a placement dispute between parents. Perhaps their solution is simply telling the parties that, in the particular courtroom, minor children don't testify in custody and placement cases.

Yet, how firm is a court's foundation when saying such things? How far can a judge go in telling parents that there is a piece of evidence or a snippet of testimony that may be relevant, but the court is going to prevent it from coming into evidence?

This article discusses this issue and offers some ideas and authority for parties and courts when confronted with the issue.[1]

Family Law and the Rules of Evidence

As the practice of family law has developed in Wisconsin, a misconception has arisen that the rules of evidence do not apply in family court. This notion has seeped into the view of the family law trial from both the bench and the bar and has led to some bad lawyering in family court.

According to Wis. Stat. section 901.01, "Chapters 901 to 911 govern proceedings in the courts of the state of Wisconsin except as provided in ss. 901.01 and 972.11." Wis. Stat. chapter 767 governs proceedings in Wisconsin's family courts, and Wis. Stat. chapters 901-911, regarding evidence, govern all proceedings in Wisconsin courts. Thus, the rules of evidence do apply in family court, and this is where a discussion of children testifying must begin.

Minors as Witnesses

As a general rule, parties to any action have a right to call witnesses who have relevant information for their case. Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[2]

In Wisconsin, every person is deemed to be competent to testify in court.[3] A witness must have knowledge about the subject they are testifying about.[4] They must be able to communicate the information they possess, and they must take an oath or affirmation.[5] If they can do these things, they are permitted to testify.

Why, therefore, is a court able to tell a parent that they will not be permitted to call their 14-year-old child to the witness stand? After all, minors testify all the time in criminal matters. They testify about sexual assaults they suffered, about physical assaults that were perpetrated upon them, or about situations they may have witnessed although they are not the victims of crimes.

Yet, when it comes to divorce or placement cases, there is a sense that a minor child's testifying is offensive.

Wisconsin's version of the hearsay rule indicates that hearsay is inadmissible except as provided for in the rules of evidence.[6] Pursuant to Wisconsin's rules of evidence, hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[7]

Wis. Stat. section 767.41(5)(am)2. states that when a court is addressing custody and physical

placement of a minor child, it should consider *inter alia* "[t]he wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional."

This is a very interesting provision in Wisconsin's family code. It clearly asserts that hearsay is admissible when communicated by a certain person, that is, the guardian ad litem or other appropriate professional, about a certain topic, that is, the wishes of the child. This is an exception to the hearsay rule that is not contained within Wis. Stat. section 906.03.

While this "family law" exception to the hearsay rule may seem straightforward, it fails to clarify what the term "wishes" means. The most literal definition of the term would seem to be the "wishes" of the child regarding a custody and placement schedule. It does not seem to go beyond that. That is, it does not seem as though this statute could be read to mean that a guardian ad litem could tell the court not only that a child wants to live with parent A and have two overnights with parent B every other week, but also that the reason for these wishes is that on three separate occasions parent B has been physically abusive to the child to the point of drawing blood.

Similarly, the rule seems to permit communicating to the court that a child wants to live with parent C and have non-overnight placement with parent D, but does not go as far as permitting communicating the child's wishes to have this schedule because parent D's alcohol addiction is such that parent D drinks a bottle of vodka every night and passes out by 8:30 p.m. It does not seem to cover both the child's wishes and all the rationales behind those wishes.

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Testimony of Children in Placement Cases: Case Law

There are a couple of cases on point that bear some examination.

Kettner v. Kettner.[8] *Kettner* involved a postjudgment placement motion in which the father asked the court to modify placement of the parties' son. At trial the father sought, through his own testimony, to introduce testimony about his son's preference to live with him. The relevant portion of the testimony unfolded as follows:

[Father's Attorney]: How do you think the circumstances have changed?

[Father]: [The son's] attitude toward people, life, sports, his – the difference in how his grades were going and all of a sudden now they're up since we got court papers going, his attitude that he has living with his mom these days, things that he tells me about in the house he's not supposed to –

[Mother's Attorney]: I'm going to object to any testimony of the child through the father.

[The Court]: I think that the guardian ad litem can address that. Mr. [G]?

[Guardian ad Litem (G)]: From –

[The Court]: You've had conversations with the child?

[Guardian ad Litem]: I have, yes.

[The Court]: Do you have any objection to this?

[Guardian ad Litem]: Well, I – I don't know – I do have an objection, I guess, because I think coming from either parent, it's a self-serving statement.

[The Court]: Objection sustained. Proceed.[9]

The father's efforts to get the son's thoughts into evidence concluded at this point. It certainly seems as though the trial court was not going to allow a witness to start explaining the son's concerns about living with his mother. The circuit court ultimately ruled against the father on this motion for a placement change. The father appealed the decision of the circuit court.

The court of appeals in its decision noted that while "self-serving" is not a valid objection, the answer by the father was objectionable because it was hearsay and, therefore, there was no error on the part of the trial court. Of course, that a family law attorney offered an objection that is not a valid objection suggests a concern about familiarity with the rules of evidence.

Nonetheless, if the father's rendition of the son's thoughts was accurate, how was he to get them before the court? The court of appeals addressed that question:

"Kettner's [the father's] suggestion in his brief that the only other person who could testify to [the son]'s wishes was the guardian ad litem is incorrect. Kettner could have requested that his son testify. Kettner chose not to do so."[10]

This statement conveys to everyone that the solution to the problem of how to get a child's thoughts before the court is to call the child as a witness. There is no other way to read this passage from the Wisconsin Court of Appeals.

A relevant question is what the court of appeals would have said if the father had tried to call the son as a witness and the circuit court had prohibited it because the circuit court believed minors should not testify in their own parents' custody cases.

As an additional concern, the guardian ad litem in *Kettner* wrote and sent to both attorneys a letter that was made a part of the court file. The circuit court considered the contents of the letter in rendering its decision. The father asserted to the court of appeals that the letter had contained new information and should not have been considered. The court of appeals opined that the father "waived his right to address these issues because he failed to object to the trial court's consideration of the contents of the guardian ad litem's letter. ..."[11]

Finally, at the close of evidence, the circuit court started to question the guardian ad litem about the quality of various evidence.[12] Pursuant to *Hollister v. Hollister*,[13] guardians ad litem are not permitted to offer testimony in a case in which they are serving as a guardian ad litem. Regarding this exchange, the court of appeals noted that "[w]e do agree with Kettner that the trial court's questioning of the guardian ad litem was inappropriate. The dialogue between the trial court and the guardian ad litem appears to ask the guardian ad litem for his opinion of the facts and solicited from him additional information not in the record."[14] In a sense, the circuit court violated the *Hollister* rule by eliciting testimony and evidence from the guardian ad litem. The court of appeals stated that the father had waived any objection to this testimony from the guardian ad litem by failing to object at the trial court level.

All of these developments are concerning. According to the *Kettner* court, some well-placed objections by the father would have deconstructed a case that looks very similar to what is going on in many Wisconsin courtrooms right now.

Hughes v. Hughes.[15] *Hughes* might offer some support to judges and guardians ad litem who want to prevent testimony from children in their parents' divorce or custody cases and offer a pathway to address this issue using legal authority.

Hughes was also a postjudgment case; the mother requested permission to move from Wisconsin to Iowa. During the trial on her motion to relocate, the mother requested that the minor child, almost 16 years old, testify at trial regarding her thoughts about the relocation. The court refused to allow it, finding that "it would be inappropriate for her to testify."[16] The trial court did admit that there would be some advantages to hearing from the daughter personally but was concerned with the parents' overall hostility toward each other and the number of different people the daughter had already spoken with about her thoughts on the move. The trial court specifically expressed the idea that a number of these individuals whom the daughter had spoken to would be testifying at trial and as a result of that testimony, "the court would be informed of [the daughter]'s views."[17]

This is interesting commentary insofar as most of that testimony (unless by an appropriate professional) would be hearsay under Wis. Stat. section 906.01(3). For the same reason (that is, the court thought that enough people had already spoken to the child about this topic), the court declined to interview the child in chambers.

In the end, the trial court in *Hughes* determined that it would not hear directly from the daughter. The trial court ruled in the father's favor, thus prohibiting the mother's move to Iowa with the daughter.

The mother appealed on various grounds. However, on the specific grounds that the child should have been allowed to testify, the court of appeals sided with the trial court. The rationale of the court of appeals is important. The court of appeals wrote the following:

"The general rule on competency of witnesses permits [the daughter] to testify as an evidentiary matter; it does not remove or negate the trial court's discretion in the particular circumstances of a custody or placement dispute to decide that it is not in the child's best interest to testify to the child's preference on placement or custody."[18]

The court of appeals did not provide any authority for the assertion that a trial court could prevent a child from testifying based upon a finding that it is not in that child's best interest to do so. However, the *Hughes* opinion clearly provides some support and guidance for a trial judge in this state who decides that the child in a placement dispute should not testify in family court.

Alternatives to this Evidentiary Quandary

Kettner and *Hughes* seem inconsistent. The idea, outlined in *Kettner*, that "Kettner could have requested that his son testify … [but] chose not to do so" seems contrary to the concept in *Hughes* that the trial court has discretion to determine that it is "not in the child's best interest to testify to the child's preference on placement or custody."

If the father in *Kettner* could have called his son to testify, but the court could have prohibited it, what is the remedy for a parent whose child is a fact witness to unsafe or unhealthy conditions in the home of the other parent? In fact, the mother in the *Hughes* case raised a similar argument:

"[The mother] argues that [the daughter] should have been permitted to testify because she could have informed the court not only of her preference, which was known, but of her reasons for her preference, thereby demonstrating that her preference was not based on pressure from her mother but on sound reasons of her own."[19]

The mother's argument drives right at the concern about how much hearsay is permitted when guardians ad litem offer their characterization of a child's wishes.

Some light, although not enough, is shed on this issue by delving further into the *Hughes* case. In discussing the practice of how a court should inform itself of the preferences of a child, the *Hughes* court noted:

"Although § 767.24(5)(b), STATS., requires the court to consider the child's preference, it does not require that the court use any particular method to inform itself of the child's preference. We conclude the only reasonable interpretation is that this is left to the court's discretion."[20]

Thus, *Hughes* seems to say that the question of how to gather information from the child is left to the discretion of the court and that the analysis of how to gather that information should include a discussion of the best interest of the child.

This holding, while understandable, is a bit troubling. It tends to create a filter for the evidence and requires courts to rely on that filter.

Nonetheless, this leaves courts with a few options.

Possible Options for Obtaining Information Regarding Minor Child's Thoughts. One option is to rely on expert witnesses such as a psychologist or child therapist who may have interviewed the child. This will be an unlikely resource in cases in which the parties have no insurance or money to afford such professionals.

Another option is to rely on the guardian ad litem. This can be satisfactory when none of the parties is contesting the representations of the guardian ad litem regarding what the child related.

Finally, the court can interview the child in chambers. This is probably the best way for the court to directly inform itself of any issues beyond mere "wishes of the child." This process can include various individuals. The court could request that a court reporter, the attorneys for the parties, and the guardian ad litem be present when the court interviews the child in chambers.

Sometimes, to further the idea that the in-chambers interview is an informal and relaxed atmosphere, a court reporter is not brought in. This might lead to the child feeling more comfortable talking. If a court reporter is not present, it is incumbent upon the judge to make some sort of record about the conversation when the parties are back in court. In *Haugen v. Haugen*, the court said, "when a trial court confers with the minor children in chambers, a record of the event should be made as a matter of course."[21] There are generally two permissible ways to create such a record:

"One would be to have the reporter in chambers during the conference and have [the reporter] record what there transpired under instructions not to translate [the reporter's] shorthand notes nor file the transcript thereof unless an appeal is taken. The second would be to have the trial judge dictate into the record the gist of what the child told [the judge] in conference."[22]

Conclusion

These are some of the solutions in situations in which parents want their child to testify. *Hughes* is the case that can assist in the finding that the child should not testify. It is not based upon any prior authority, and it has not been tested in the Wisconsin Supreme Court, but it creates a basis upon which parties and the court can rely. *Kettner* is the case that outlines all of the concerns that can arise if *Hughes* is followed. *Haugen* provides a procedure that can be used by the parties and the court if avoidance of "in-court" testimony is desired but direct information from a child to the court is appropriate. **WL**

ENDNOTES

[1]For further discussion, see Gretchen Viney, *Children as Witnesses in Family Court*, 26 Wis. J. Fam. L. 65 (April 2006).
[2]Wis. Stat. § 904.01.
[3]Wis. Stat. § 906.01.
[4]Wis. Stat. § 906.02.
[5]Wis. Stat. § 906.03.
[6]Wis. Stat. § 906.02.
[7]Wis. Stat. § 906.01(3).
[8]*Kettner v. Kettner*, 2002 WI App 173, 256 Wis. 2d 329, 649 N.W.2d 317.
[9]*Id.* ¶ 16.
[10]*Id.* ¶ 17.
[11]*Id.* ¶ 20.
[12]*Id.* ¶ 19 n.8.
[13]*Hollister v. Hollister,* 173 Wis. 2d 413, 496 N.W.2d 642 (Ct. App. 1992).
[14]*Kettner*, 2002 WI App 173, ¶ 19 n.8, 256 Wis. 2d 329.
[15]*Hughes v. Hughes,* 223 Wis. 2d 111, 588 N.W.2d 346 (Ct. App. 1998).
[16]*Id.* at 116.
[17]*Id.*
[18]*Id.* at 132.
[19]*Id.* at 131.
[20]*Id.*
[21]*Haugen v. Haugen,* 82 Wis. 2d 411, 417, 262 N.W.2d 769 (1977) (citing *Seelandt v. Seelandt,* 24 Wis. 2d 73, 80-81, 128 N.W.2d 66 (1964)).
[22]*Id.* **WL**