

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2015AP55
2015AP56
2015AP57**

**Cir. Ct. Nos. 2012TP206
2012TP207
2012TP208**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO N.G.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

MARY G.,

RESPONDENT-APPELLANT.

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO L.G.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

MARY G.,

RESPONDENT-APPELLANT.

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO A.B.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

MARY G.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County:
MARK A. SANDERS, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Mary G. appeals the orders terminating her parental rights to three of her daughters, L.G., N.G., and A.B. We affirm.

BACKGROUND

¶2 On August 9, 2012, petitions were filed to terminate Mary G.'s parental rights to three of her daughters. The petition alleged termination grounds of failure to assume parental responsibility and continuing CHIPS. The petition was based, in part, on injuries sustained by L.G. L.G. suffered a pubic bone fracture after Mary G. stomped on her.² CHIPS dispositional orders placing each child outside of Mary G.'s home were entered on November 3, 2010. Multiple

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² Mary G. was charged criminally with physical abuse of a child. Mary G. stipulated to the contents of the criminal complaint.

conditions of return were required for the return of Mary G.'s daughters. The conditions, along with the Bureau of Milwaukee Child Welfare's responsibilities for service referrals, including the following:

Condition 1: Meet the following Goals for Behavioral Change.

Goal 1: [Mary G.] demonstrates impulse control by implementing new techniques to manage her anger. This is evidence[d] by no outbursts, physical violence, or threats with her children or in her community.

Services to target behavior change: Anger Management groups.

Goal 2: [Mary G.] demonstrates that she is able to meet her own emotional needs and maintains consistent emotional stability by consistently participating in treatment that address[es] her emotional and mental health needs. This would include: regular attendance at psychiatric appointments, medical compliance, regular attendance at outpatient therapy, and consistent implementation of mental health providers recommendations.

Services to target behavior change: Invisible Children's Program through Mental Health America, Individual Therapy, Medication Management.

¶3 The Bureau agreed to work with the Shorehaven Behavioral Health to help Mary G. meet the conditions of return. The Bureau agreed that if Mary G. successfully participated in therapy at Shorehaven, and made progress, the CHIPS dispositional order that Mary G. participate in mental health treatment and learn to manage her mental health, anger and emotions, would be satisfied. Mary G. allowed Shorehaven's therapists to communicate her progress to the Bureau's case managers at team meetings.

¶4 Prior to the grounds phase of trial, the State sought discovery of the therapy notes from Shorehaven to explore whether Mary G. met the conditions of

return relating to her mental health. The circuit court denied the motion, but held that the information would have to be disclosed if Mary G. planned to use that information in her defense. The circuit court again addressed the issue on the first day of trial, after Mary G.'s counsel told the court that she planned to call Michelle Donovan, Mary G.'s therapist at Shorehaven, to testify in Mary G.'s defense. The circuit court then granted the State's motion, stating "the intent to call this witness to present testimony with respect to whether or not [Mary G.] has met the conditions ... effectively waives the privilege and that the State may have a conversation with this witness about what she can testify to."

¶5 Multiple witnesses, including Donovan, testified at the trial. Donovan testified that Mary G. suffered from post-traumatic stress disorder and bipolar disorder. Donovan testified that Mary G. was consistent with her treatment, loved and missed her children, and was motivated to work on her mental health issues. She testified that Mary G. eventually came to accept some responsibility for L.G.'s injury. Donovan stated that Mary G. obtained stable housing and made some progress on scheduling her medical appointments. On cross-examination, however, Donovan testified that Mary G. was unable to implement anger management skills, was unable to manage day-to-day stress, and did not take her prescribed medications. Donovan stated that Mary G. failed to follow Donovan's recommendation to transition to a therapist with specific training and experience in trauma and failed to attend the post-traumatic stress disorder support group meetings that Donovan recommended.

¶6 The State also presented evidence that Mary G. had not met the goals for behavioral change and that she did not meet the conditions of her children's return. Multiple witnesses testified about Mary G.'s mental health

struggles and anger issues. Kimberly Moran, one of the case managers on Mary G.'s case, testified that before Mary G. started working with Shorehaven, Mary G. worked with an organization called Mental Health America. Moran testified that Mary G. had an aggressive attitude towards the advocate at Mental Health America and that Mary G. said, "it took everything in [Mary G.'s] power not to hurt [the advocate]." Moran testified that during her meetings with Mary G., Mary G. did not accept responsibility for L.G.'s injuries. Moran also testified that Mary G. exhibited violent behaviors such as making repeated, threatening phone calls to the Bureau.

¶7 Sara Roanhaus, another case worker who worked with Mary G., testified that when she took over Mary G.'s case, Mary G. was not regularly taking her medications. Roanhaus stated that Mary G. still struggled with impulse control, and at times, spoke to her children using vulgar language. Roanhaus stated that Mary G. did not understand the inappropriateness of using such language.

¶8 The circuit court found that grounds existed to terminate Mary G.'s parental rights to her girls on the basis of continuing CHIPS. The circuit court found that despite over 200 counseling sessions, Mary G. still exhibited significant outbursts of threats and verbal violence and was unable to manage her anger. The court also found that Mary G. did not consistently attend psychiatric appointments and did not consistently comply with her medication requirements. The court ultimately ordered the termination of Mary G.'s parental rights. This appeal follows.

DISCUSSION

¶9 On appeal, Mary G. contends that her parental rights were unfairly terminated on the basis of her mental illness. She contends that her therapist records were privileged and therefore inappropriately turned over to the State, rendering it impossible for her to mount a meaningful defense. She also argues that the circuit court inappropriately considered whether she was appropriately managing her medications because medication management was not a condition of her children's return. We disagree.³

¶10 Whether to terminate a parent's rights is left to the sound discretion of the circuit court. *State v. Margaret H.*, 2000 WI 42, ¶27, 234 Wis. 2d 606, 610 N.W.2d 475. We review a circuit court's decision whether to terminate a parent's rights for an erroneous exercise of discretion. *See Rock County DSS v. K.K.*, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). "A proper exercise of discretion requires the circuit court to apply the correct standard of law to the facts at hand." *Margaret H.*, 234 Wis. 2d 606, ¶32. In order to establish grounds under WIS. STAT. § 48.415(2) (continuing CHIPS), the State must prove: (1) the child has been adjudged to be a child in need of protection and services and placed, or continued in a placement, outside his or her home for a total period of six months or longer pursuant to one or more court orders containing the notice required by law; (2) the agency responsible for the care of the child and the family has made a reasonable effort to provide the services ordered by the court; (3) the parent has failed to meet the conditions established

³ Many of Mary G.'s arguments were underdeveloped in her brief-in-chief. We decline to address these arguments and consider our resolution of the issues discussed in this opinion to be dispositive.

for the safe return of the child to the home; and (4) there is a substantial likelihood that the parent will not meet these return conditions within the nine-month period following the fact-finding hearing. WIS. STAT. § 48.415(2). These elements must be proved by clear and convincing evidence. WIS. STAT. §§ 48.424(2), 48.31(1).4.

Privileged Communications.

¶11 The heart of Mary G.’s argument is that she was unable to mount a meaningful defense because the circuit court allowed the State to review privileged therapy notes, making “the deck stacked against [her].” We conclude that Mary G.’s therapist communications were not privileged because Mary G. used those communications as an element of her defense.

¶12 WISCONSIN STAT. § 905.04(2) governs the general rule of privilege. The statute provides:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient’s physical, mental or emotional condition, among the patient, the patient’s physician, the patient’s podiatrist, the patient’s registered nurse, the patient’s chiropractor, the patient’s psychologist, the patient’s social worker, the patient’s marriage and family therapist, the patient’s professional counselor or persons, including members of the patient’s family, who are participating in the diagnosis or treatment under the direction of the physician, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

There are multiple exceptions to this privilege, including WIS. STAT. § 905.04(4)(c), which eliminates the privilege if a patient relies on communications relevant to mental health as an element of the patient’s defense.

The statute states:

There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

¶13 Here, the conditions of the children's return hinged on Mary G.'s ability to comply with her mental health needs. Mary G. called her therapist to testify in her defense. A significant part of her defense to the continuing CHIPS ground was her compliance and progress in therapy with Shorehaven. By relying on her therapist's notes herself, Mary G. made the privileged communications an element of her defense. Thus, the communications were not privileged.

Compliance with Medications.

¶14 Mary G. also contends that the circuit court improperly considered her lack of medication management in rendering its termination order because there was no court order requiring her to take medications. She argues "there was no winning the TPR case at grounds for Mary G. if she could not affirmatively prove she was taking her meds." We disagree.

¶15 One of the many conditions of the children's return was that Mary G. implement the recommendations of her service providers. Among the services required to target Mary G.'s behavioral change was a medication management service. Donovan testified that Mary G. was more mentally stable when she took her medications, stating that "Mary seemed to function with less ... extremes" while on her medications. Medication compliance was integral to Mary G.'s ability to manage her mental health and provide a safe environment for her children. The order specifically included a request of "medical compliance" and

the consistent implementation of mental health providers' recommendations and ordered services, including "medication management." (Capitalization omitted.) The request that, in addition to many other actions, she take her recommended medications cannot seriously be disputed. Mary G. herself testified that psychiatric medications were recommended to her but that she refused to take them. Mary G.'s failure to take her psychotropic medications was a failure to follow the recommendations of her service providers. The circuit court appropriately considered this factor when rendering its decision.

¶16 For the forgoing reasons, we affirm.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

