COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3075

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO DEAN C. JR., DESTINY M.C. AND DAVID M.L., A PERSON UNDER THE AGE OF 18:

DODGE COUNTY HUMAN SERVICES AND HEALTH DEPARTMENT,

PETITIONER-APPELLANT,

V.

DEAN C. AND HELEN C.,

RESPONDENTS-RESPONDENTS.

APPEAL[1] from an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

[1] This appeal is expedited under WIS. STATS. § 809.107(6)(e) (1997-98).

¶1 EICH, J.[2] The Dodge County Department of Health and Human Services appeal from a nonfinal order denying its motion to disqualify an expert witness and refusing to consider an *in camera* review of an affidavit submitted in support of its motion. We affirm.

¶2 The Department filed petitions seeking termination of the parental rights of Helen C. and Dean C. to their children on grounds that the children were in continuing need of protection or services pursuant to WIS. STATS. § 48.415(2)(a) (1997-98).[3] The court appointed Robert Browning, a licensed psychologist, to conduct an evaluation. Shortly before the scheduled trial date, Browning submitted a sixteen-page report concluding, among other things, that the County's professional staff had made "errors of clinical judgment" with respect to the case and that the professional judgments of the persons involved were based on what he termed "Pop Psychology." Learning that the parents were intending to call Browning as a witness at trial, A.B., a department employee who was in charge of implementing the CHIPS dispositional orders, approached the County's attorney and disclosed that a few years earlier she had sought treatment from Browning and she believed that he had formed a negative opinion of her during the treatment sessions—as both an individual and a professional—which might have influenced his assessment in this case. According to the County, A.B. was the person whose efforts and professional judgment with respect to the case came under criticism by Browning.

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[2] This appeal is decided by a single judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98).

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶3 The County moved to disqualify Browning from testifying and to suppress his report on grounds that it would be unable to explore his possible bias in the case because the psychologist/client privilege would prohibit him from answering any questions about his knowledge of A.B. At the hearing on the County's motion, Browning testified that his opinion in the case was not influenced by any clinical relationship he may have had with any county employee, and that he was not biased. When asked if he had ever treated any of the county employees involved in the case, he declined to answer.

¶4 At this point the County's attorney stated that he felt that Browning's refusal to answer any questions on the subject warranted his disqualification as a witness, but if the court believed it was necessary to make a threshold showing of bias, he was prepared to offer further evidence in the form of an affidavit prepared by A.B. explaining why she believed Browning was biased against her. He offered to submit the affidavit to the court for its *in camera* review. Counsel for the parents then indicated that if Browning would be unable to testify, they would request that the trial be postponed to enable them to obtain new psychological evaluations.

¶5 The court found that the interest of the County in showing Browning's bias was outweighed by the interest in going forward with the trial on the scheduled date. The effect of the court's ruling was that Browning could testify but the County would not be permitted to ask questions regarding any possible bias toward the employee arising out of their confidential relationship. The court refused to consider A.B.'s affidavit, reasoning that it should not consider any evidentiary material which would not be available to the opposing side.

¶6 The County first argues that the court erred in denying its motion to disqualify Browning on grounds that his bias against A.B.—who, as indicated, was a key person involved in the implementation of the CHIPS order which formed the basis for the termination proceedings—influenced his report. We reject the argument.

¶7 Trial courts have wide discretion in admitting expert opinion evidence. ***Kreyer v. Farmers' Co-op. Lumber Co.***, 18 Wis. 2d 67, 75, 117 N.W.2d 646 (1962). This discretion extends to determination of both the proper scope of cross-examination for impeachment, *see* ***Rogers v. State***, 93 Wis. 2d 682, 689, 287 N.W.2d 774 (1980), and the extent of the inquiry with respect to potential bias. ***State v. Williamson***, 84 Wis. 2d 370, 383, 267 N.W.2d 337 (1978). Our review of discretionary rulings is highly deferential: We look to the record to assess whether the circuit court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts. ***State v. Salentine***, 206 Wis. 2d 419, 429-30, 557 N.W.2d 439 (Ct. App. 1996). Generally, "if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision," we will affirm. ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987) (citation omitted).

¶8 In denying the County's motion, the circuit court reasoned as follows:

> [O]n this record there is nothing indicting that, in fact, there was a physician/patient relationship, there's nothing indicating that that physician/patient relationship was with an individual who is directly involved in the case…. [T]his court does not know who is involved, does not know if there was any bias. The Court knows that there is no such thing as a perfect jury trial and sometimes evidentiary issues, the issues of relevance sometimes take a back seat to other competing interests….

> The Court [is] aware that the bias of an expert is an area that can be shown by extrinsic evidence. It's clearly relevant…. The Court in this case believes that the public policy to proceed promptly to a trial in a termination of parental rights [matter] outweighs the interests of the county in being able to fully explore the biases of an expert witness, whatever th[ose] biases may be …. [The Court] make[s] that finding also based on the fact that [it] believe[s] that the principal issue here is what was done by the county to further the Court's order. What is not at issue is the competency, the other issues surrounding those individuals who actually performed the services. The issue is what was done. And that's the overriding concern…. [The Court] weighed the public policy interests and [it] believe[s] that the public policy interests outweigh the other interests of the county.

¶9 We are satisfied that the court considered the facts and relevant legal principals in deciding that it would not exclude Browning's testimony. We therefore conclude that it properly exercised its discretion in denying the Department's motion to disqualify.

¶10 The County also argues that, after denying the motion to disqualify, the court should have considered *in camera* the affidavit prepared by A.B. explaining why she believed Browning was biased against her so the court could determine whether, in its opinion, the bias was so great that it should outweigh the interest in moving forward promptly to trial. The court's stated reasons for denying that request were these:

> In this case, the information to be provided to the Court is relevant to the issue of bias of Dr. Browning. For this Court to consider relevant information without requiring that it be disclosed to the other side, would be inappropriate.
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> This affidavit is prepared for the express purpose of attempting to convince the court that Dr. Browning is allegedly biased and that, therefore, he should be excluded from testifying because [the Department's counsel] will be unable to cross-examine him in front of the jury on that bias. It would be inappropriate for the Court to consider an

> affidavit of this kind without permitting opposing counsel to review it, to potentially voir dire or cross examine the individual who prepared the affidavit, and to present counter affidavits or testimony regarding the information presented in the affidavit.
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> Finally, the Court has always been less willing to perform an ex parte examination of information when the Court is the fact finder…. As a fact finder, [the Court] is less willing to review information ex parte since such an examination would raise the question as to whether the Court as a fact finder had inappropriately utilized the information in reaching a decision….

¶11 We do not think the circuit court erroneously exercised its discretion in declining to inspect the sealed affidavit. It contained privileged information and no argument is made that A.B. has waived the privilege, whether by the fact of giving the affidavit to the County or otherwise. Indeed, the County has consistently taken the position that A.B.'s privilege is intact.[4] And, under the law, the privilege is personal to A.B.; she alone can claim it or waive it. The County can't do either on her behalf. *See* WIS. STAT. §§ 905.04(2) and (3).[5]

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[4] Indeed, as indicated below, the County argues that the existence of any privilege is beside the point.

[5] WISCONSIN STAT. § 905.04, reads in part:

> (2) GENERAL RULE OF PRIVILEGE. 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 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, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.
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> (3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient. The person who was the physician, registered

(continued)

¶12 The County argues in its reply brief that questions of privilege are immaterial—that the issue is one of conflict of interest on Browning's part which should be addressed "independent of [any question of] privilege." The fact remains, however, that, however phrased, the County's position that Browning is a biased witness—at least insofar as A.B. is concerned—requires disclosure of privileged information and there is nothing in the record suggesting that A.B. has elected to waive the privilege. And, as the trial court ruled, the County's motion was facially inadequate to show any bias on Browning's part. Finally, the County has not persuaded us that the court erroneously exercised its discretion in declining to consider the affidavit *in camera* based on its belief that it would be fundamentally unfair to consider such evidence *ex parte*. Beyond that, the court balanced the relevant factors and concluded that the interest in further exploring any bias of the expert was outweighed by the need to proceed with a timely trial. Such a decision is consistent with the relevant statutes and case law, and the policy applicable to TPR cases making expediency a primary concern. *See*, *e.g.*, ***Elgin and Carol W. v. DHFS***, 221 Wis. 2d 36, 48, 584 N.W.2d 195 (Ct. App. 1998) (keeping the child "in limbo" for longer than necessary is inimical to the child's best interests, the critical factor in all such cases).

By the Court.—Order affirmed.

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

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nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor may claim the privilege but only on behalf of the patient. The authority so to do is presumed in the absence of evidence to the contrary.