COURT OF APPEALS DECISION DATED AND FILED

March 31, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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 No. 2010AP13 **Cir. Ct. No. 2009TP7**

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

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

BRIDGET A. N.,

PETITIONER-RESPONDENT,

V.

JUSTIN E. H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed*.

¶1 BROWN, C.J. The sole issue in this termination of parental rights appeal is whether the guardian ad litem violated the motion in limine order prohibiting questioning of witnesses focusing on the best interests of the child (an

issue appropriate at the disposition phase rather than the "grounds for termination" phase). The circuit court sustained all objections to questions of that nature but, rather than granting a mistrial motion, directed the jury to disregard all such questions and responsive answers. Grounds for terminating the rights of the natural father, Justin E. H., to his natural son, Breyden, were found by the jury and, after the disposition phase, his rights were terminated. He appeals, claiming that the guardian ad litem's disregard of the motion in limine order prejudiced him, that the curative instruction did not resolve the prejudice, and that he should get a new trial. We hold that the circuit court did not erroneously exercise its discretion in deciding the matter as it did. We affirm.

¶2 Prior to the start of the jury trial, which would determine whether a ground existed to terminate Justin's parental rights, his attorney brought a motion in limine that requested, inter alia, that no one "introduce the evidence or express any opinion or make any reference to the best interests of the child since that's not an issue for this hearing." While the record does not indicate whether the court granted or denied the request in open court, we note that there was no objection. We assume, for the sake of this appeal, that the motion was granted, without objection.

¶3 At trial, the guardian ad litem engaged in a line of questioning of the petitioner, Bridget N., the mother of Breyden. We will not repeat, chapter and verse, each question that caused Justin's attorney to finally object. Suffice it to say, the questions had to do with the strength of Bridget's marriage to her present husband, whether her present husband wanted to adopt Breyden, Breyden's relationship with her husband and her mother's fear of Justin's parenting choices. After several questions of this nature were asked and answered, Justin's attorney objected because he thought "we're getting into stuff here that doesn't have

anything to do with the … issues that are before the court." The trial court sustained the objections.

¶4 The guardian ad litem also called Bridget's husband to the stand and examined him. Again, the guardian ad litem went into the present marital relationship between Bridget and him, explored his desire to adopt and obtained testimony that the husband wanted to be financially responsible for Breyden. To each of these questions, Justin's attorney objected and to each, the trial court sustained the objection. Then, during cross-examination inquiries about attempts by Justin's family to be in contact with Breyden, the husband volunteered, without being asked, that he loved Breyden and that Breyden called him "Dad." Justin's counsel objected on grounds that the question was nonresponsive and that objection was sustained.

¶5 The trial continued, Bridget put in her case and rested, Justin put in his cased and rested, and then Justin's attorney moved for a mistrial. Justin's counsel recounted the testimony and objections we described above, argued that they violated the motion in limine order that best interests of the child issues not be gone into, and asserted that, despite the court's having sustained the objections, the jury was not going to disregard the questions and answers. The trial court noted that the objections had been sustained and that a motion to strike had been granted. The court indicated it could craft another instruction that would "go directly to that point." Justin's counsel did not believe that this would cure the problem, would not withdraw his objection, but did indicate that, if the court was inclined to give a further instruction to the jury, it would be that the jury should disregard any testimony of the stepfather except as it related to Justin's attempts or lack of attempts to have contact with Breyden. The attorney said: "That might be the trick." The trial court said it would give that instruction, and it did.

¶6 Now, as we indicated above, the jury found cause to terminate Justin's parental rights to Breyden and the dispositional hearing resulted in his rights being terminated. And so we address the denial of the mistrial issue.

¶7 The first thing we note is that the objections made by Justin's attorney were based on the questions being irrelevant to the issues before the jury. The objections were not based on an alleged violation of the motion in limine order. Until the motion for mistrial, the issue of whether the questions were "best interests" based and violated the in limine order never came up. It is axiomatic that objections must be presented with such specificity that the court knows exactly the basis for the objection. *See* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 332, 129 N.W.2d 321 (1964). A general objection that the questioning is getting off topic is simply not the same thing as an accusation that the questioning attorney is violating an order of the court. This court holds that the objections were not specific enough to put the trial court on notice that there was an in limine order being violated, nor did the objections alert the guardian ad litem that she was violating an order of the court.

¶8 As for the motion for a mistrial, it came too late. Again, the law is clear that motions for mistrial must be made at the time that the error takes place. ***Kink v. Combs***, 28 Wis. 2d 65, 72, 135 N.W.2d 789 (1965). An attorney cannot wait, go through the whole trial and then move for mistrial. ***Leibl v. St. Mary's Hosp.***, 57 Wis. 2d 227, 231, 203 N.W.2d 715 (1973). By adhering to a contemporaneous motion for mistrial rule, Wisconsin courts mean to negate the practice of waiting to see how the trial is going before bringing the motion.

¶9 Not only does it come too late, but the trial court here exercised its discretion in denying the mistrial motion in favor of a curative instruction which

the court believed would cure the error. The law presumes that curative instructions will be listened to and followed by a jury. *See* ***Hoppe v. State***, 74 Wis. 2d 107, 120, 246 N.W.2d 122 (1976); ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490. We see nothing here that would lead us to believe that the curative instruction, fashioned by Justin's counsel himself and agreed to by the trial court, would not be followed by the jury.

By the Court.—Order affirmed.

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