COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-1668

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF CHRISTINA G., AND VALERIE G., PERSONS UNDER THE AGE OF 18:

LAFAYETTE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

CAROLYN G.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

ROGGENSACK, J.[1] Carolyn G. appeals the termination of her parental rights to her two children, Christina G. and Valerie G. She ascribes error

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

to the circuit court's granting the guardian ad litem four peremptive strikes on behalf of the children and to the circuit court's exclusion of opinion evidence which Carolyn proffered. We conclude that the circuit court's finding that the children's interests are separate and distinct from Carolyn's and from the County's is not clearly erroneous; that the circuit court properly interpreted § 805.08(3), STATS., and appropriately exercised its discretion thereunder; and that it did not err in excluding Carolyn's opinion evidence on the "diligent efforts" required of the County. Therefore we affirm the judgment of the circuit court.

BACKGROUND

Carolyn and Eugene[2] had two children, Christina, born January 13, 1988, and Valerie, born March 27, 1992. Christina and Valerie first came to the attention of the Lafayette County Circuit Court when they were removed from their home in June of 1994, subsequent to a petition alleging abuse and neglect. At that time, Valerie, who was approximately two years old, showed signs of physical injury and both children showed evidence of neglect, such as dirty clothes, matted hair and rotting teeth. The home was also very dirty, emanating a strong smell of urine. The presence of human feces on the floor was noted, as was a lack of hygiene throughout. In an effort to improve the conditions in the children's home, personnel from Lafayette County Human Services provided parenting training, training in personal hygiene, training in housekeeping skills, meal preparation and general child care skills.

[2] Eugene G., the father of Christina G. and Valerie G., does not appeal the termination of his parental rights, which occurred at a separate proceeding.

On August 31, 1994, Christina and Valerie were returned to their home and a parenting aid was provided in the home on a daily basis. The aid tried to structure Carolyn's care for the children and her care for the household, as well as providing support for discipline for the children.

Shortly after the children were returned to the home, Eugene and Carolyn separated. Eugene stated that he did not believe he was capable of caring for the children by himself and he was very concerned about the children being cared for solely by Carolyn. Carolyn has been described in psychological evaluations as cognitively disabled and has a difficult time learning household and child care skills.

In October of 1994, the girls were removed once again, based on further allegations of abuse and neglect. Thereafter, they did not return to the home of either parent. However, in an effort to return the children toCarolyn, continuing parenting classes were provided to her. Testimony at trial demonstrated that Carolyn had participated in every parental training program offered by Lafayette County, at least twice, but that she had been unable to improve her parenting and homemaking skills. As part of the County's diligent efforts to improve Carolyn's skills, she was provided with four social workers, including one who had specialized training in working with cognitively disabled and impaired persons. Carolyn also received psychological counseling from the County over this same period of time. On July 29, 1997, due to insufficient progress, the County filed a petition for the termination of Carolyn and Eugene's parental rights.

On August 28, 1997, the circuit court entered an extensive scheduling order which required, among other things, that Carolyn disclose all

experts and provide a copy of their final reports on or before September 26, 1997. Carolyn did not comply with this order for one of the witnesses she attempted to have qualified as an expert at trial.

A fact finding hearing on the County's petition was held from December 17th through December 30th before a jury. Prior to the selection of the jury, the circuit court determined that Carolyn, the County and the guardian ad litem would receive four peremptory strikes each. Carolyn objected to the guardian ad litem's receiving strikes in addition to those allocated to the County. On December 30th, the jury returned a verdict unanimously finding grounds for the termination of Carolyn's parental rights. On February 11, 1998, the circuit court heard testimony on the best interests of the child standard and made a dispositional order terminating Carolyn's parental rights to both girls. This appealed followed.

DISCUSSION

Carolyn bases her appeal on what she contends was an erroneous interpretation and application of § 805.08(3), STATS., and on certain evidentiary rulings made by the circuit court.

Standard of Review.

The construction and application of a statute presents a question of law which we review independently, without deference to the circuit court. ***I.P. v. State***, 157 Wis.2d 106, 118-19, 458 N.W.2d 823, 829 (Ct. App. 1990). The exclusion of certain evidence from trial is a discretionary determination of the circuit court which we will not reverse, if there is a reasonable basis in the record for the circuit court's decision. ***State v. Oberlander***, 149 Wis.2d 132, 140-41, 438 N.W.2d 580, 584 (1989).

Peremptory Strikes.

The circuit court allocated four peremptory strikes to Carolyn. She does not object to the number of strikes she was given, but rather, she objects because the County and the guardian ad litem, who was participating on behalf of the children, also were given four strikes each. She cites ***Waukesha County Dep't of Soc. Serv. v. C.E.W.***, 124 Wis.2d 47, 368 N.W.2d 47 (1985), for the proposition that the County and the guardian ad litem should have been required to share the County's peremptory challenges.

Section 805.08(3), STATS., provides the legal framework in which the circuit court must determine how many peremptory strikes each party will be allowed. It states in relevant part:

> Each party shall be entitled to 3 peremptory challenges …. The parties to the action shall be deemed 2, all plaintiffs being one party and all defendants being the other party, except that in case where 2 or more defendants have adverse interests, the court, if satisfied that the due protection of their interests so requires, in its discretion, may allow peremptory challenges to the defendant or defendants on each side of the adverse interests, not to exceed 3. Each side shall be entitled to one peremptory challenge in addition to those otherwise allowed by law if additional jurors are to be impaneled under sub. (2).

C.E.W., cited by Carolyn in her contention of error, commented on § 805.08(3), STATS., and involved the involuntary termination of the parental rights of a natural father, to his three minor children. There, the circuit court allowed the guardian ad litem to present and cross-examine witnesses, but it precluded him from making an opening or a closing statement to the jury and from exercising any peremptory strikes of potential jurors. The jury returned a verdict favorable to C.E.W. and the circuit court dismissed the petition to terminate his parental rights. The County appealed.

One of the issues presented for review in ***C.E.W.*** was whether the circuit court had erred in refusing to allow the guardian ad litem peremptory strikes to exercise on behalf of the children. In its discussion, the supreme court specifically instructed that the interests of the parent, the child and the state all have different focuses in a termination proceedings. It recognized that those of the child may not be completely aligned with either the state or with the parent. ***Id.*** at 64-66, 368 N.W.2d at 56-57. The court also pointed out that § 805.08(3), STATS., allocates the number of peremptory strikes among "parties" and it uses the terms plaintiffs and defendants, while the participants in a termination proceedings are the petitioner, the respondent and of course, the children.[3] It concluded that the terminology differences were not significant, but that a court was faced with the question of whether the children's interests were aligned with one of the other parties when applying the mandate of § 805.08(3). ***Id.*** at 67, 368 N.W.2d at 57. The court in ***C.E.W.*** concluded that under the facts therein presented, where "the guardian ad litem has aligned himself with the petitioner (County) in the fact finding stage," the children might be treated as plaintiffs for purposes of selecting jurors and applying § 805.08(3). Given that alignment, the court then suggested that the county and the guardian ad litem should share three strikes. ***Id.***

However, in ***David S. v. Laura S.***, 179 Wis.2d 114, 507 N.W.2d 94 (1993), the supreme court again considered the way in which the children fit into a termination of parental rights proceedings. There, it concluded that the "guardian ad litem's role in the … proceedings is as an advocate for [the child's] best

[3] The court did not state that the children were actually parties to the proceeding, but it implied they should be treated as such.

interests and arises from [the child's] being an interested person or party." ***Id.*** at 132, 507 N.W.2d at 100.

In the case at hand, the circuit court carefully examined the interests of the State, the children and the parent when determining how the peremptive strikes of § 805.08(3), STATS., should be allocated. The court stated:

> The role of the guardian ad litem, quite frankly, overlaps on both sides. The guardian ad litem has to consider your client (Carolyn G.), your client's relationship with the children, the importance of that.
>
> She has to consider the issues, whether conditions of return are met or not met, how that impacts on her clients. And because of overlap, I think you have to have, as the court has indicated, separate strikes. She is—the guardian ad litem is trying her own case in this particular matter.
>
> I see her role as looking at both cases and making her determination of what—of the interest of her clients and developing the evidence to show how the issues, conditions of return, if they are met or not met, is the department doing what they can do. All of those factors are important to her over and apart from what Mr. Jorgenson has.
>
> He's got one position and the importance is the importance of the mother to a child, that relationship. She has that as an issue. She has to look at the relationship.

C.E.W., ***David S.*** and § 805.08(3), STATS., all require the circuit court to exercise its discretion in coming to a conclusion about how peremptory strikes are to be allocated. Here, the court carefully considered whether the guardian ad litem on behalf of the children was aligned with the mother or with the County. It found that "her interests overlap both." That finding is not clearly erroneous; therefore, we do not disturb it. Section 805.17(2), STATS. Because the circuit court exercised its discretion based upon an appropriate factual record, and treated the children as parties as required by ***David S.***, it correctly applied the

statute to the facts of record when it allocated the children, the County and the mother four peremptory strikes each. No error occurred.

Exclusion of Testimony.

Carolyn attempted to present the testimony of Polly Snodgrass as an expert witness to opine that the County had not made "diligent efforts" to return the children to Carolyn, as the statutes require it to do. An objection was made to her opinion testimony because she had not been named as an expert, and a report of her final opinion was not provided by September 26, 1997, as the scheduling order required. It was also argued that she didn't have a sufficient foundation, through an investigation of the pertinent facts relevant to this specific case and through education, to give the type of opinion which was being proffered. An objection was also sustained when Carolyn's counsel attempted to elicit an opinion from Carolyn's other expert witness, Dr. Fields, in an area in which she had not been qualified, an expert in "Sociology and Human Services."

Whether a witness qualifies as an expert witness is a matter within the discretion of the circuit court. ***I.P. v. State***, 166 Wis.2d 464, 471-72, 480 N.W.2d 234, 237 (1992). It is axiomatic that an expert may testify only in areas in which he has expertise and then based only upon facts relevant to the case at hand. *See* ***Herman v. Milwaukee County Children's Hosp.***, 121 Wis.2d 531, 551, 361 N.W.2d 297, 306 (Ct. App. 1984) (citations omitted). Additionally, it is within the circuit court's discretion to limit the participation of a witness who has not been named in compliance with a scheduling order. ***Gerrits v. Gerrits***, 167 Wis.2d 429, 446, 482 N.W.2d 134, 141 (1992).

As part of its deliberations about whether to permit Ms. Snodgrass to testify, the court heard that she was a trained nurse, but also that she had never met

Carolyn. The court also learned that she had reviewed only 200 pages out of the thousands of pages of documents that had been produced. After extensive presentations by counsel, the circuit court excluded the testimony based upon what it found to be her inability to contribute to an issue on which expert opinion was warranted, when it stated:

> I have reviewed her report now, I have reviewed her curriculum vitae, I have reviewed and we've discussed what the issues will be before the jury and her—I don't think, from this indication that she has a nursing background, that she's qualified to be rendering the opinions … I think she recognizes that by saying I'm not going to offer an opinion on the ability to parent because that means you have to have some understanding of the psychology or psychiatry of the cognitively disabled, which she hasn't shown here, and I think that's necessary for her to qualify as an expert.
>
> There is nothing in here that shows that she has that training or experience, especially the education to rise to the level of background understanding and education that would let her raise this.
>
> ….
>
> So what she's down to, apparently, is reviewing the efforts at training Carolyn … and giving her services to help her learn to parent and whether those are appropriate or not, and that is something that Ms. Fields is going to testify about.
>
> Well, then it is cumulative, and folks, I remind you, you have got three days of trial.
>
> [And then there's] [t]he lateness, Ms. Roetter is correct. She's argued strongly on that point. This comes in late. We get a late report. We've had now the report. Ms. Snodgrass hasn't seen Carolyn, hasn't talked to her, evaluated her, and probably can't. Maybe she can't.
>
> She hasn't any indication that she's run her through any programs, done any evaluations.
>
> All she is going to do is comment on the documents. You have got another witness much more qualified to do that.

The court based its decision on facts of record. It clearly articulated its reasons for excluding the testimony of Ms. Snodgrass. Therefore, we conclude it did not erroneously exercise its discretion.

In regard to the excluded testimony of Dr. Fields, while she had been duly received as an expert in child psychology, she had only a bachelor's degree in sociology, no degree in human services and had not worked in a department of human services since 1983. There was no erroneous exercise of discretion in the circuit court's exclusion of this testimony either.

CONCLUSION

The circuit court appropriately interpreted the mandate of § 805.08(3), STATS., in light of the directives of the Wisconsin Supreme Court found in ***C.E.W.*** and in ***David S.*** when it permitted the guardian ad litem to exercise four peremptory strikes on behalf of the minor children, in addition to giving four peremptory strikes both to the County and to Carolyn. Additionally, the circuit court did not erroneously exercise its discretion in excluding the opinion testimony of Ms. Snodgrass and Dr. Fields on the "diligent efforts" of the County to return the children to Carolyn's care. Therefore we affirm the judgment terminating Carolyn's parental rights to Christina and Valerie.

By the Court.—Judgment affirmed.

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