COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2016

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. 2015AP2622
2015AP2623
2015AP2624

Cir. Ct. Nos. 2014TP23
2014TP24
2014TP25

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

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

JEFFERSON COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

J. V.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO M. K. C., A PERSON UNDER THE AGE OF 18:

JEFFERSON COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

J. V.,

RESPONDENT-APPELLANT.

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

JEFFERSON COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

J. V.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Jefferson County: DAVID WAMBACH, Judge. *Affirmed.*

¶1 KLOPPENBURG, P.J.[1] This case concerns the termination of parental rights of J. V. with respect to three of her minor children, M. K. C., N. N. C., and A. G. C.[2] The circuit court found as grounds for termination that the children were in continuing need of protection or services under WIS. STAT. § 48.415(2). The mother argues that the circuit court erred in excluding relevant evidence of events that occurred after the date the termination of parental rights petitions were filed, specifically relating to an order for return of the mother's eldest child, M. V., who was not subject to the TPR proceedings. As I explain

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] In this opinion, "the children" refers only to the three children, M. K. C., N. N. C., and A. G. C., who are the subjects of the TPR proceedings.

below, assuming without deciding that the postpetition evidence relating to M. V. was relevant to the children's TPR proceedings, any error in excluding that evidence was harmless. Therefore, I affirm.

BACKGROUND

¶2 The following is a summary of the undisputed facts. J. V. is the mother of six minor children including M. K. C., N. N. C., and A. G. C., who are the subjects of this appeal. The children were found to be children in need of protection and services in Jefferson County and were placed out of the home pursuant to court orders on February 19, 2013 (hereafter referred to as the CHIPS orders). The children have remained out of the home since then. The CHIPS orders listed various conditions that must be complied with in order for the children to be safely returned to the mother.

¶3 In October 2014, approximately eighteen months after the CHIPS orders, the children's guardian ad litem filed a petition for termination of the mother's parental rights with respect to each of the children. Each petition alleged that the child was in continuing need of protection and services.

¶4 In January 2015, the mother filed a motion for return of the children as well as of her eldest child, M. V., who was then fifteen years old and not part of the TPR proceedings. The circuit court held a hearing in March 2015 on the mother's motion for return of the four children. The mother provided the only testimony at that hearing. The circuit court granted the motion for return as to the eldest child M. V., and denied the motion as to the three younger children. The circuit court noted M. V.'s age, self-sufficiency, and above average intelligence as important factors in its determination.

¶5 At a pre-trial hearing on the TPR petitions in April 2015, the mother asked the circuit court to allow testimony at trial "that she had met the conditions for the return of [her eldest child M. V.]" The County and the GAL objected on the basis of relevance. The circuit court denied the mother's request because "evidence regarding the fact that [M. V.] has been the subject of an order for return" was not relevant to the three younger children, who were then 7, 5, and 3 years old. The court further reasoned that even if that evidence was marginally relevant, allowing it at trial would be more prejudicial than probative because a "significant period of time [would be spent] trying to distinguish how different these children are in terms of their age and development."

¶6 On April 24, 2015, the circuit court held a fact-finding hearing on the petitions to terminate the mother's parental rights as to the children. The court found as grounds for termination that the children were in continuing need of protection or services under WIS. STAT. § 48.415(2). The court accordingly found the mother unfit and subsequently terminated her parental rights as to the children after a dispositional hearing on July 10, 2015.

DISCUSSION

¶7 "Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. "In the first, or 'grounds' phase of the proceeding, the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist." ***Id.*** "[I]f grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶18, 333 Wis. 2d 273, 797 N.W.2d 854 (quoted sources omitted). The second phase, the

dispositional hearing, "occurs only after the fact-finder finds a Wis. Stat. § 48.415 ground has been proved and the court has made a finding of unfitness. In this step, the best interest of the child is the 'prevailing factor.'" ***Id.***, ¶19 (citations omitted).

¶8 On appeal, the mother challenges only the first step, establishing the statutory ground of continuing CHIPS for termination of parental rights under WIS. STAT. § 48.415(2). The continuing CHIPS ground for termination of parental rights, WIS. STAT. § 48.415(2)(a), is established by proving the following four elements:

> 1. "That the child has been adjudged to be a child … in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders ...." WIS. STAT. § 48.415(2)(a)1.
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> 2. "That 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." WIS. STAT. § 48.415(2)(a)2.b.
>
> 3. "That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders …." WIS. STAT. § 48.415(2)(a)3.
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> 4. "*[T]hat the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 9-month period following the fact-finding hearing* …." WIS. STAT. § 48.415(2)(a)3. (emphasis added).

When assessing the fourth element, "the likelihood that a parent will not meet certain conditions in the future may necessarily involve consideration of fresh facts occurring between the date the petition was filed and the [fact-finding] hearing." ***S.D.S. v. Rock Cnty. Dept. of Social Servs.***, 152 Wis. 2d 345, 359, 448 N.W.2d 282 (Ct. App. 1989). Thus, "the [circuit] court must admit evidence of postfiling events on facts relevant to the 'substantial likelihood' element in [sec. 48.415(2)(a)3.], Stats." ***Id.***

¶9 The mother argues that the circuit court erred in not admitting postpetition evidence that the mother had met the conditions for safe return as to M. V. The mother asserts that that evidence was relevant to the three children in the current TPR proceedings and that exclusion of that evidence prevented her from "presenting a complete defense" as to the fourth element for establishing the continuing CHIPS ground: whether there was a substantial likelihood that the mother would not meet the conditions for safe return in the nine months following the fact-finding hearing. The mother contends that the circuit court "made an unfitness finding premised upon an incomplete understanding of the [mother's] progress toward completing the conditions."

¶10 The County counters that even if it was error to exclude the evidence as to M. V., that error was harmless because it did not undermine the outcome of the fact-finding hearing. Assuming without deciding that there was error in excluding evidence relating to M. V., I conclude that that error was harmless.[3]

¶11 "No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of … error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial." WIS. STAT. § 805.18(2). "For an error to 'affect the substantial rights' of a party, there must be a reasonable

[3] Because I conclude that the asserted error was harmless, I do not address the County's alternative argument that the postpetition evidence was not relevant. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

possibility that the error contributed to the outcome of the action or proceeding at issue." ***Evelyn C. R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 (quoted source omitted). A "reasonable possibility" is one that is sufficient to undermine the confidence in the outcome of the proceeding. ***State v. Patricia A. M.***, 176 Wis. 2d 542, 556, 500 N.W.2d 289 (1993). "Thus, a reviewing court must look to the totality of [the] record and determine whether the error contributed to the trial's outcome." ***Id.*** at 556-57. "If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless." ***Evelyn C. R.***, 246 Wis. 2d 1, ¶28.

¶12 Here, the CHIPS orders contained numerous conditions for safe return of the children, including the following:

- "[The mother] shall demonstrate that she is willing and able to assume an active parenting role for [the children and their] other siblings."
- "[The mother] shall provide safe, stable and healthy living conditions for each child. "
- "[The mother] shall demonstrate [a]n ongoing ability to financially support her children, maintain an appropriate residence (age appropriate with safe and clean spaces for each child), provide safe and nurturing home environment for each child, and provide the basic daily care and supervision for [the children]."
- "[The mother] shall obtain stable employment."
- "[The mother] shall maintain communication with school staff and attend any teacher conferences or recommended one-on-one meetings."
- "[The mother] shall refrain from using any non-prescription or illegal drugs and/or alcohol. Any prescribed medication shall be taken only in the dosage directed by the treating physician and/or psychiatrist. [The mother] shall sign any releases necessary for the case manager to verify any prescribed medications."
- "[The mother] shall have any alcohol or drug assessments and submit to random drug testing and PBT's as deemed appropriate and directed by JCHSD and shall follow recommendations and treatment plan, as deemed appropriate by the case manager."

- "[The mother] shall participate in and successfully complete a parenting class through the department or another approved agency, as deemed necessary and directed by the case manager."

- "[The mother] shall participate in individual, family and/or group counseling as deemed necessary by the case manager. She must attend consistently without unexcused absences and follow all recommendations of the treatment providers."

¶13 At the end of the fact-finding hearing, the circuit court made the following findings as to the mother's failure to satisfy the conditions for safe return and the substantial likelihood that she would not meet these conditions within nine months after the fact-finding hearing.

¶14 *Housing.* The circuit court found that the mother exhibited a pattern of instability in housing during a period of approximately sixteen months after the children were placed outside of the home, and that that pattern is the best predictor of stability in the long term:

> [T]his record shows this pattern of instability for a period of approximately 16 months before she gets stable housing. And in the Court's view, it is that past behavior which is the most ... reliable and best predictor…. Stability also by its nature means long term. It means that one can expect that it will be there for months in the future. The record does not support that.

¶15 *Employment.* The circuit court found that the mother also exhibited a pattern of instability in maintaining employment, and that during the pertinent period, the mother held six different jobs and lost all of those jobs:

> [D]oes [the mother] now have a job at the time this petition is filed and is that different than her situation before? Yes. Because it's now full-time work…. It's the stability of maintaining work which will lead to a stable household. If you lose your job, then you are going to get evicted. That's how that is going to work, and the past record was such that [the mother] had six different jobs … and then lost them.

¶16 *School Communication.* The circuit court found that the mother failed to meet the condition to maintain communication with the children's school, and that despite any potential work conflict schedule, the mother could have used alternative means to maintain such communication:

> [The mother] failed to meet the conditions as it relates to consistently maintaining communication with the school staff …. [T]here's nothing in this record that said [the mother] missed the parent/teacher conferences [and] instead called the teacher and talked to them independently or sent them an e-mail and communicated with them that way. There are other things that parents can do because [the mother] is not the only parent who works and cannot always make a standardized or pre-set parent/teacher conference time to find out how their child is doing in school.

¶17 *Non-Prescription or Illegal Drug Use.* As indicated above, one of the conditions for safe return was that the mother must refrain from using non-prescription or illegal drugs. The circuit court found that there had been one reported incident in October 2013 involving the police, when the mother ingested Xanax that she had received from another person and drove while under the influence, and that the mother remains "delusional" and "dishonest" as to that incident:

> [S]omebody else [is] prescribed medication which [the mother] accept[s] from them …. [The Court] got the impression [that that person] gave it to [the mother] at some earlier point…. [The mother] got a couple of them [and] squirreled them away. That's what drug seekers do. They acquire medication and other things that they can get and then they hang on to them for a rainy day when they are going to self-prescribe and take it.
>
> ….
>
> [The mother] still here today … [is] still trying to claim that [she was] fine that day …. [C]alling it delusional would be too great. It's absolutely dishonest. It's an unwillingness to admit something that everybody else in the world knows

> to have been true, and that this Court believes [she] know[s] to be true too.

¶18 *Alcohol and Drug Assessment and Treatment Plans.* The circuit court stated that it was unable to make a finding because the mother refused to sign the prerequisite release:

> [H]ow can the Court find that you [the mother] met the condition of an alcohol and other drug assessment when you go have one but then you refuse to sign a release or can't seem to get around to signing the release, or whatever it is, so that even as late as today Ms. Lowery [the family development worker] still does not know.

¶19 *Parenting Class*. The circuit court found that the mother completed two parenting classes, but that the mother failed to complete the most important classes and that she continues to exhibit a kind of "oppositional defiant behavior" towards this requirement:

> [T]he Court finds clearly that [the mother] did the two parenting classes … but the record is also consistent that the Department determined that they felt the most comprehensive and complete parenting class that [the mother] needed was the … Incredible Years [class]. The record is true that [the mother] did not complete Incredible Years and so she failed to meet another one of the critical conditions for the return of the children, and could she do it within the next nine months?... [B]ased on the record, the fact that she was in [the Incredible Years class], [and] failed to do it …. [T]his is another one of those times where it is, sort of, this kind of oppositional defiant behavior to say, ["][W]ell, you can tell me to do Incredible Years, I will do the ones I think I need to do or want to do or will do and then I'm going to say, I've done them. They are parenting classes. Good enough.["]
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> ... [The mother's] past reticence is the best predictor of the fact that there would be future reticence.

¶20 *Counseling Attendance*. The circuit court found that the mother failed to meet the condition established and that the mother failed to attend

appointments, including appointments with therapy providers that she had selected herself:

> Every therapist or therapy-type provider she was directed to see, even … the one that [the mother] was willing to see or I think arranged on her own, even … with that provider there were some no-calls, no-shows.
>
> The Court had ordered [that the mother] must attend consistently without unexcused absences, and … that did not happen. Instead, the record shows that there were consistent patterns of her having no-call, no-show with all of the different providers for counseling.

¶21 Given the above findings, the circuit court held that the mother failed to meet the conditions established for the safe return of the children and that there was a substantial likelihood that she would not meet these conditions within the nine-month period following the fact-finding hearing. The record supports the circuit court's findings, and those findings demonstrate that there was a substantial likelihood that the mother would not meet all of the conditions for safe return within nine months after the fact-finding hearing.

¶22 The mother's argument on appeal—that the exclusion of postpetition evidence as to M. V. was prejudicial error—ignores the overwhelming evidence to the contrary. The mother's lack of effort to satisfy all of the conditions for safe return over an approximately eighteen-month period between February 2013, when the children were removed from the home, and October 2014, when the petitions were filed, along with her pattern of instability in housing and employment, demonstrated that there was a substantial likelihood that she would not satisfy all of the conditions within nine months from the fact-finding hearing. This was so regardless of her conduct with respect to the eldest child M.V. Thus, assuming without deciding that the evidence as to M. V. was relevant to the TPR

proceedings for the three younger children, there is no reasonable possibility that any error in excluding that evidence contributed to the termination of the mother's parental rights as to the three younger children.

CONCLUSION

¶23 For the reasons set forth above, I conclude that the alleged error in excluding relevant postpetition evidence pertaining to M. V. was harmless. Therefore, I affirm.

By the Court.—Orders affirmed.

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