COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 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 No. 2016AP824 **Cir. Ct. No. 2014TP000154**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

C. A. P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID C. SWANSON, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] C.A.P. appeals from an order terminating her parental rights to her daughter, K.S.L. ("K."). She argues that the trial court erroneously exercised its discretion when at the Termination of Parental Rights ("TPR") dispositional hearing, it excluded her brother and grandmother from testifying and declined to permit her trial counsel to recall a witness on the final afternoon of trial. As a result of these witness limitations, she argues, the trial court "fail[ed] to consider the relevant evidence necessary for making the proper determinations of the best interests of the child," and she seeks reversal of the order.

¶2 The trial court excluded K.'s brother and grandmother's testimony on the grounds that the testimony was irrelevant and cumulative and in the interest of judicial economy. And although the trial court declined to permit trial counsel to recall the other witness, it nonetheless adopted trial counsel's offer of proof as to her testimony and made a finding incorporating it into the record.

¶3 We conclude that the trial court properly exercised its discretion in restricting the evidence pursuant to the court's inherent and statutory powers of reasonable control over the mode and order of witnesses, the needless presentation of cumulative evidence, and ability to exclude irrelevant evidence pursuant to WIS. STAT. §§ 904.02, 904.03 and 906.11(1) and ***State v. McClaren***, 2009 WI 69, ¶3, 318 Wis. 2d 739, 767 N.W.2d 550. Additionally C.A.P. fails to show how the excluded evidence is relevant to the factors the trial court must consider under WIS. STAT. § 48.426(3). And because the trial court properly considered the

[1] This appeal is 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.

WIS. STAT. § 48.426(3) factors, we conclude there is no basis for finding that the trial court erroneously exercised its discretion in terminating C.A.P.'s parental rights. We affirm.

BACKGROUND

¶4 C.A.P. is the mother of K., who was born in August 2012. K. was born addicted to opiates due to C.A.P.'s drug use during pregnancy. From the time K. was released from the hospital, C.A.P. and K.'s father,[2] who were in treatment for drug addiction, were provided intensive in-home services in an attempt to allow K. to remain in the home with them.

¶5 On April 18, 2013, K. was taken into temporary physical custody and placed with relatives of C.A.P. on the grounds that the safety plan was not working, the parents were continuing to use drugs, and the protective agents were not effective. A CHIPS petition was filed April 24, 2013. A dispositional order was entered July 12, 2013.

¶6 On June 19, 2014, the State filed a petition seeking to terminate parental rights under WIS. STAT. § 48.415(10). On April 13, 2015 at the grounds phase of the TPR proceeding, C.A.P. entered a no contest plea to the allegation that K. remained in continuing need of protection or services. C.A.P. was found unfit, and a dispositional hearing was scheduled for August 19, 2015.

¶7 The dispositional hearing consisted of four days of testimony and a fifth day for closing argument and decision.

[2] K.'s father appeared with counsel at some early hearings in this case; however, a default judgment was ultimately granted terminating his parental rights after he failed to appear at subsequent hearings, and he has not appealed.

¶8 On August 19, 2015, the first day, the trial court heard testimony from three witnesses for the State, and one witness C.A.P. was permitted to call out of order for scheduling reasons. At the end of that day's proceedings, the trial court tolled the time limits without objection and calendared three dates for the remainder of the hearing.

¶9 On October 19, 2015, the second day, the hearing started at 2 p.m., and the State called two witnesses. At the close of the day's proceedings the court indicated the trial would continue on October 22 and be completed on October 23, 2015.

¶10 On October 22, 2015, the third day, the State called its final witness and then rested. The GAL called one witness. C.A.P. called three witnesses. At the close of the hearing that day, the trial court stated that the next day's hearing would begin at 9 a.m., an hour earlier than originally planned, as the trial court attempted to accommodate the remaining witness testimony and complete the hearing.

¶11 On October 23, 2015, the fourth day, at the start of the hearing, the trial court asked counsel for C.A.P. how many witnesses she planned to call. Counsel responded with a list of ten names, including C.A.P.'s father, brother and grandmother, and stated that she also would recall one of her witnesses from the previous day because there was one fact counsel had "neglected to cover with her." The trial court said it would permit testimony from "[a]ny professional who has worked with the case," but it asked counsel for an offer of proof to determine the relevance of the family members' testimony. Counsel offered that the relatives would provide testimony concerning the expectations at the time K. was initially detained and "the family dynamic" in general. Counsel explained that C.A.P.'s

father's testimony concerned how long C.A.P. had been residing with him. The trial court allowed C.A.P.'s father to testify on that issue. As to C.A.P.'s brother and grandmother, the trial court stated:

> Here is my concern. A lot of what you describe sounds duplicative. These issues [have] been covered by other witnesses. [C.A.P.] is going to testify. [C.A.P.'s mother] will testify. She's been clearly a significant person throughout the history of the case. However, I just don't see from what you've described that the Court needs to hear additional testimony from other family members what sounds to me like the same sorts of issues that other witnesses have covered. I am going to limit the record in this case with family member testimony. . . .
>
> Under 904.03, the Court can exclude testimony where it may be relevant if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence. I think those circumstances apply.
>
> I've heard from other family members. I'm going to hear again from [C.A.P.] and her mother. It's clear to me the family is very unified in their approach and opinions. I don't need to hear that same statement from five different people, so I am going to exclude their testimony.

¶12 The trial court made clear that its reason for its focus on the plan for testimony was the urgency to conclude the hearing without needing to set the case over.[3] The court said,

> It's important to finish this. Obviously this disposition has been lingering. The pleas were entered in April initially; and I don't know why, but the case changed hands and the prior judge adjourned disposition for four months. We

[3] The trial court's concern for expeditious disposition is especially well founded in cases of this nature. Termination of parental rights petitions are subject to multiple statutes designed to force timely resolution. *See, e.g.*, WIS. STAT. §§ 48.417 (1) (petitions to be filed if children have been in out-of-home care for 15 of the most recent 22 months), 48.422(2) (trial to be held within 45 days after the hearing on the petition), and 48.427 (disposition to be determined within 10 days of receiving evidence).

> started disposition in August. We're on day four …. I am not willing to push this out another two or three months. I'm putting everyone on notice at the end of the hearing if we don't finish today, we'll be looking at next week.

¶13 C.A.P. called three witnesses in the morning and four witnesses in the afternoon. At one point in the day, prior to a break, the trial court agreed to allow the witness from the prior day to be recalled. However, when counsel failed to return on time after the lunch break, the trial court reversed its decision, stating, "I am going to sanction you. Earlier I did give you permission to recall [your witness]. I am vacating that order. I will accept that she made a 220-SAFE call. You are not going to be permitted to recall [the witness]." At the end of the hearing, counsel for C.A.P. put on the record her objection to the decision to exclude the two witnesses and to sanction her by disallowing the recall of the witness. The trial court set a date the following week for closing arguments and a decision, which necessitated adjourning a court trial from its morning calendar.

¶14 On October 29, 2015, C.A.P. filed a motion for reconsideration of the decision to exclude testimony and seeking to schedule an additional day of testimony.

¶15 On October 29, 2015, the fifth day, the trial court denied the motion for reconsideration, stating that it had exercised its discretion to limit testimony that was "repetitive and duplicative." It noted that the court had read letters submitted by the family members whose testimony was excluded and by the witness who was not recalled.

¶16 The trial court then addressed all six factors set forth in WIS. STAT. § 48.426(3).[4] It noted at the outset that K. was age three and had been in out-of-home care for all but the first eight months of her life. After weighing each factor, the trial court found that it was in the best interests of K. to grant the petition terminating parental rights. An order to that effect was entered. C.A.P. now appeals.

DISCUSSION

The trial court did not erroneously exercise its discretion because the excluded testimony was repetitive, cumulative or irrelevant, and the court provided a reasoned analysis as to why the statutory factors supported the termination.

¶17 C.A.P. argues that the trial court's decision to exclude the testimony of her brother and grandmother was an erroneous exercise of discretion. She argues that the decision deprived the circuit court of relevant information

[4] WISCONSIN STAT. § 48.426(3) states,

Factors. In considering the best interests of the child under this section the court shall consider but not be limited to the following:

(a) The likelihood of the child's adoption after termination.

(b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.

(c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.

(d) The wishes of the child.

(e) The duration of the separation of the parent from the child.

(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

necessary to the determination of the termination of parental rights, and she asks this court to reverse the order terminating parental rights and remand for further proceedings.

¶18 "We review a circuit court's decision to exclude evidence … under an erroneous exercise of discretion standard." ***Dobbratz Trucking & Excavating, Inc. v. PACCAR, Inc.***, 2002 WI App 138, ¶19, 256 Wis. 2d 205, 647 N.W.2d 315 (citations and internal quotations omitted). "Therefore, we will affirm the decision if the court examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion using a demonstrated rational process." ***Id.***

¶19 The statutes relating to exclusion of evidence are WIS. STAT. §§ 904.02, 904.03 and 906.11(1):

> All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. **Evidence which is not relevant is not admissible.**

WIS. STAT. § 904.02 (emphasis added).

> **Although relevant, evidence may be excluded** if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or **needless presentation of cumulative evidence**.

WIS. STAT. § 904.03 (emphasis added).

> The judge shall **exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence** so as to … [a]void needless consumption of time.

WIS. STAT. § 906.11(1).

Our supreme court has emphasized how central this responsibility is to the functioning of the courts:

> The authority of a circuit court under WIS. STAT. § 906.11 fits within the broader context of a court's inherent powers "which must necessarily be used to enable the judiciary to accomplish its constitutionally or legislatively mandated functions." ***City of Sun Prairie v. Davis***, 226 Wis.2d 738, 747, 595 N.W.2d 635 (1999) (citing ***State ex rel. Friedrich v. Dane County Cir. Ct.***, 192 Wis.2d 1, 16, 531 N.W.2d 32 (1995)). **Foreseeing potential obstacles to a smoothly run trial and taking the necessary steps to avoid them is manifestly within the inherent power of a circuit court**.

McClaren, 318 Wis. 2d 739, ¶3 (emphasis added.)

¶20 C.A.P. argues that it was error to exclude the testimony of her brother and grandmother. The only law she cites for this proposition is the statute providing that the parent has the right to present evidence and be heard at the dispositional phase. WIS. STAT. § 48.427(1). There is no question that C.A.P. was heard at the dispositional phase and presented voluminous evidence—eleven witnesses over five days of trial. The statute does not mandate that the trial court is required to allow *every* witness C.A.P. presents to testify.

¶21 There is also no question that a parent's right to present evidence does not eliminate the court's role as gate-keeper of the evidence. And the statute cannot strip the trial court of its inherent powers to exercise its "constitutionally and legislatively mandated function" to run a fair trial by efficient use of judicial resources. *See* ***McClaren***, 318 Wis. 2d 739, ¶3.

¶22 We conclude that the record demonstrates that the trial court properly excluded the witnesses on three bases. First, the brother's and grandmother's testimony was properly excluded as irrelevant. Based on the offer of proof made regarding the testimony of the two witnesses—the brother would

have testified that the family's initial understanding was that the detainer of K. was a temporary one, and the grandmother would have testified about the "family dynamic"—the trial court correctly concluded that this evidence was not relevant to the factors it must consider under WIS. STAT. § 48.426. It is not error to exclude irrelevant evidence. *See* WIS. STAT. § 904.02.

¶23 Even if the evidence had some relevance, a trial court does not err by excluding "needless presentation of cumulative evidence." *See* WIS. STAT. § 904.03. To the extent it had any relevance, C.A.P. does not explain how this evidence was not cumulative to already presented evidence. As the trial court noted, C.A.P. and her mother had both testified that the family's initial understanding of the detainer of K. was to be a temporary one. Thus additional testimony from the brother on this point is cumulative. And as to the grandmother's proffered testimony on "family dynamic," which counsel explained was intended to show that part of the family did not think the foster parents (who were also relatives) were appropriate caregivers, this too would be cumulative because testimony about the family dynamic was abundant throughout the trial.

¶24 Finally, the trial court is required to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to … [a]void needless consumption of time." WIS. STAT. § 906.11(1). The record repeatedly shows the trial court valiantly attempting to give a fair amount of time to a disposition hearing within its "jammed calendar," with particular concern over the necessity to expedite a decision on the child's interests that had already taken far too long. When asked on August 19 how much time she needed for her case, counsel for C.A.P. answered that she needed "a solid day to complete my witnesses." The trial court gave her more than that. The trial court heard testimony from eleven witnesses for C.A.P.: one witness (out of order) August 19,

three on October 22, and seven on October 23. The trial court invited written submissions from the excluded witnesses for whatever they wished the court to know. The trial court did not limit the length of the submissions. The father, brother, and grandmother submitted letters. The trial court stated that it had read all submissions prior to making its decision. The trial court accepted as true the sole fact about which the witness, if recalled, would have testified.

¶25 C.A.P.'s argument concerning the witness who was not permitted to be recalled to testify about making the 220-SAFE call is not distinct from her arguments concerning the family member testimony. Again, she appears to rely on the right to present evidence found in WIS. STAT. § 48.427(1), a right that does not remotely require the trial court to permit the recall of a witness. In this case, C.A.P. had previously called the witness and failed to ask about the call; the trial court accepted as fact the proposition that her testimony on being recalled was intended to support; the trial court permitted the witness to submit written testimony instead; and the trial court knew from the witness's prior testimony that the witness had no first-hand knowledge about the allegation she reported and discounted its relevance accordingly. C.A.P. has not shown that the trial court's determination of the irrelevance of the testimony was erroneous. In fact, the record shows that the trial court was exceedingly accommodating to C.A.P.'s requests for inclusion of evidence and witnesses.

¶26 C.A.P. seeks reversal on the grounds that because the trial court did not hear the excluded testimony, it erroneously exercised its discretion in granting the termination of parental rights petition. For the reasons given above, this court cannot agree. The trial court exercised its discretion to exclude irrelevant evidence, avoid needless consumption of time, and control its calendar. It considered all of the pertinent facts and applied the correct statutory law. The trial

court provided a reasoned analysis as to why the statutory factors supported the termination. It reached a very reasonable determination that it would be in K.'s best interests to have C.A.P.'s parental rights terminated.

¶27 As to the first factor, it noted that the likelihood of adoption after termination was high in this case because the foster family with whom K. had been placed for thirty months was approved to adopt her.

¶28 As to the second factor, it considered her good health at the time of disposition and contrasted it with her very poor health at the time she was removed from her parents' home.

¶29 As to the third factor, it found that K. "clearly had substantial relationships with her parents." In considering the second part of that factor, the trial court extensively discussed the family conflicts and hostility between the parents and the foster family, who are paternal relatives of C.A.P. Conduct that the court found "very very concerning" included a series of calls made after May 2015 to the 220-SAFE line, a hotline for mandatory reporters to call in suspected abuse or neglect, alleging sexual abuse of K. at the hands of her foster family. These calls were investigated, and they "subjected [K.] to repeated examinations" by child protective services workers, and all were found to be unsubstantiated. The court drew the inference that the calls were made "to have an impact in this case" and found that "completely inappropriate." In light of that fact and other evidence of violence and broken relationships in C.A.P.'s family, the court found that "it would not be harmful to [K.] to sever the relationship with the biological family because her biological family has made it so difficult to maintain the relationships in [K.]'s current setting."

¶30 As to the fourth factor, it found that a child of this age could not express her wishes except through her behavior, and the evidence from neutral observers showed that K. was happy and well-adjusted in the foster home and less so in visits with C.A.P.

¶31 As to the fifth and sixth factors, the court found that K.'s evident adjustment and good health in the foster home, the length of the separation, and the fact that with the planned adoption by the foster family, K. would be able to enter into a more stable and permanent family relationship favored termination.

¶32 Accordingly, this court affirms the order terminating parental rights.

By the Court.—Order affirmed.

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