COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2018

Sheila T. Reiff
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. 2017AP1282
2017AP1289
2017AP1309

Cir. Ct. Nos. 2013JG23
2013JG24
2012FA2

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

IN THE MATTER OF THE GUARDIANSHIP OF A. A. E.:

D. H.,

OTHER PARTY-APPELLANT,

V.

N. K. E.,

OTHER PARTY-RESPONDENT,

S. R. S. P/K/A S. E.,

OTHER PARTY.

IN THE MATTER OF THE GUARDIANSHIP OF K. K. E.:

D. H.,

OTHER PARTY-APPELLANT,

V.

N. K. E.,

OTHER PARTY-RESPONDENT,

S. R. S. P/K/A S. E.,

OTHER PARTY.

IN RE THE GUARDIANSHIP AND PLACEMENT OF A. A. E. AND K. K. E. IN

IN RE THE MARRIAGE OF N. K. E. V. S. R. E.:

D. H.,

OTHER PARTY-APPELLANT,

V.

N. K. E.,

PETITIONER-RESPONDENT,

S. R. S. P/K/A S. R. E.,

RESPONDENT.

APPEALS from an order of the circuit court for Dodge County: JOSEPH G. SCIASCIA, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Two guardianship cases and a divorce case have been consolidated for this appeal. The maternal grandmother of two children appeals a circuit court order terminating her guardianships of the children and awarding sole custody and primary physical placement to the children's father.[1] The grandmother makes the following challenges to circuit court decisions on appeal (or, as to some, that she would make if the challenges were properly framed): (1) the court erroneously exercised its discretion by denying the grandmother's motion to dismiss the father's petitions to terminate the grandmother's guardianships as a sanction for pre-trial discovery violations by the father, or by failing to take other steps in response to the discovery violations; (2) the court erroneously exercised its discretion by allowing the father's expert witnesses to testify by telephone; (3) the court erred in allegedly failing to enforce foreign protection orders, issued by a Washington state court; (4) the court erred in concluding that a social worker was qualified to testify as an expert witness; (5) the court erroneously exercised its discretion in terminating the guardianships; (6) the court was not impartial; and (7) the court relied on erroneous factual findings or made an erroneous discretionary determination in deciding that there were not "other compelling reasons" to continue the grandmother's guardianships. We affirm, for the reasons explained in the discussion below.

[1] The parties, D.H. and N.K.E., and the children, A.A.E. and K.K.E., are referred to by their initials in the caption and in court documents. For ease of reference, we refer to D.H. as "the grandmother," N.K.E. as "the father," and A.A.E. and K.K.E., collectively, as "the children" or "the two children." No party argues that there is a difference that matters for purposes of this consolidated appeal between the circumstances and interests of A.A.E. and K.K.E.

BACKGROUND

¶2 The following pertinent facts were found by the circuit court following a bench trial in these consolidated cases, or are otherwise taken from the record. In 2013, the grandmother petitioned the circuit court to appoint her as guardian of two of her grandchildren, both children of her daughter, on the ground that the children's parents were unable to adequately care for them. The court granted the grandmother's guardianship petitions. Shortly thereafter, the grandmother and her husband moved to Washington state with the two children.

¶3 In 2015, while the children were residing in Washington state, criminal charges of sexual assault were filed against the children's father in Wisconsin state court. Before the Wisconsin criminal charges were filed, but based on the allegations underlying the charges, the grandmother sought and obtained protective orders in Washington state court prohibiting the father from having contact with the two children. Pending resolution of the criminal charges, in 2015 the father agreed to voluntarily dismiss petitions that he had filed to terminate the grandmother's guardianships and to award the father sole custody and primary placement. The criminal charges were subsequently dismissed and were not reissued.

¶4 In 2016, the father filed new petitions to terminate the grandmother's guardianships. These 2016 petitions are the subject of this appeal. They were the subject of numerous motions and hearings before the circuit court, leading up to the 2017 trial.

¶5 At trial, the circuit court made explicit findings regarding the credibility of each witness who testified and, as to some witnesses, the court

specified how much weight the court placed on their testimony. We discuss below as necessary certain details of the testimony. However, particularly notable were explicit findings by the court that the father provided credible testimony but that the testimony of the grandmother "on the whole ... [was] NOT credible." After trial, the circuit court entered an order terminating the grandmother's guardianships and granting custody and primary physical placement to the father.

DISCUSSION

¶6 We address in turn the seven issues raised by the grandmother on appeal, explaining in each instance why we affirm the challenged circuit court decision.

Court's Response To Discovery Violations

¶7 The grandmother argues that the circuit court erroneously exercised its discretion in denying her motion to dismiss the father's 2016 petitions to terminate the guardianships, or to take other appropriate steps such as postponing the trial, in response to the father's failures to follow multiple discovery obligations under a scheduling order. She submits that the failures constituted egregious conduct. The grandmother argues in part that the court should not have considered it a mitigating fact for the father that he did not have an attorney in the proceedings. We conclude that the court properly exercised its discretion in responding to the discovery violations, as reasonably explained by the court.

¶8 The father's discovery failures were the following: to timely file a witness list with a summary of anticipated witness testimony; to timely name expert witnesses; and to file an expert report and a curriculum vitae for each expert.

¶9 The circuit court "has both statutory and inherent authority to control its docket through a scheduling order." ***260 N. 12th St., LLC v. State of Wisconsin DOT***, 2011 WI 103, ¶57, 338 Wis. 2d 34, 808 N.W.2d 372. "A party's failure to follow a scheduling order" may be considered by the court as a ground for sanctions. ***Id.***, ¶58. "'The decision to impose sanctions and the decision of which sanctions to impose ... are within a circuit court's discretion.'" ***Hefty v. Strickhouser***, 2008 WI 96, ¶28, 312 Wis. 2d 530, 752 N.W.2d 820 (quoted source omitted.)

¶10 We will sustain a discretionary decision "'if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Id.*** (quoted source omitted). Because dismissal is a particularly harsh sanction for a party's failure to obey discovery orders, "'a dismissal ... should be considered appropriate only in cases of egregious conduct by a claimant.'" ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 275, 470 N.W.2d 859 (1991) (quoted source omitted), *overruled on other grounds by* ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898.

¶11 We first address the court's decision not to sanction the father. The circuit court made an implicit finding that the father's conduct was not egregious. Further, the grandmother points to nothing in the record, and our own review reveals nothing, that would support a conclusion that the father's conduct with regard to the scheduling order was "egregious," meaning "'extreme, substantial and persistent.'" *See* ***Dane Cty. DHS v. Mable K.***, 2013 WI 28, ¶70, 346 Wis. 2d 396, 828 N.W.2d 198 (quoted source omitted). The circuit court explicitly found that "each party ... had ample time to fully prepare" and the grandmother was not

"prejudiced by any failure of [the father to] comply with scheduling orders." These determinations of the court are supported by the record.

¶12 As for the father's pro se status, the grandmother fails to direct us to any facts here, or to any legal authority, that would support a conclusion that it was improper for the circuit court to rely, in part, on the father's pro se status in exercising its discretion in responding to his shortcomings in following the discovery order.

¶13 We turn to the grandmother's assertion that the circuit court should have taken other steps, such as a continuance of the trial. However, the grandmother does nothing more than suggest that the circuit court had "more appropriate way[s]" to address the father's discovery failures. As far as we can discern this is an improper invitation for us to exercise the discretion of the circuit court in an area in which its discretionary authority is, for obvious reasons, especially broad.

¶14 For these reasons, we conclude that the court did not erroneously exercise its discretion in addressing the discovery issues.

Telephonic Testimony

¶15 The grandmother argues that it was an erroneous exercise of the circuit court's discretion to rule, during the course of trial, that the father's experts could testify by telephone at trial, despite the fact that the father had not moved before trial to allow the telephonic testimony. The grandmother argues that, due to the lack of notice, the court should have excluded the testimony entirely, rather than allow the experts to testify by telephone. The grandmother asserts that having the experts testify by phone made it "difficult to examine" the experts

"because of the numerous medical records" and that, as a result of this purported difficulty in examining the experts, the grandmother was prejudiced at trial.

¶16 "The decision whether to allow telephonic testimony lies within the sound discretion of the circuit court." ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶32, 312 Wis. 2d 435, 752 N.W.2d 359 (citation omitted); *see also* WIS. STAT. § 807.13(2) (2015-16).[2]

¶17 The testimony at issue was provided by a mental health care provider from a Veterans Administration facility in Madison, where the father had received treatment, and a pediatrician who treated the children in Fond du Lac. As a basis for allowing this testimony by phone, the circuit court explained that the father "has been under two disadvantages" in attempting to arrange his experts' testimony. One disadvantage was that the Veterans Administration can be "hard to deal with." The other was that the father lived in Ripon, the trial was in Juneau, and the experts were in Madison and Fond du Lac. Further, the court gave weight to the fact that the father was proceeding pro se and had no experience with proper court procedures. In addition, the court found that the "subject matter could be critical to the case," and therefore "to block the testimony at this point would be almost tantamount to ending the case" and it was necessary to allow the evidence to give the father "his day in [c]ourt." The court explained that it gave "due consideration" to the fact that the grandmother's attorney and the guardian ad litem for the children were somewhat disadvantaged by the lack of prior discovery.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶18 On this record, we conclude that the court examined relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion about telephonic testimony that a reasonable judge could reach, and therefore we defer to the "sound discretion of the circuit court." *See* ***Welytok***, 312 Wis. 2d 435, ¶32 (citation omitted.)

Foreign Protection Orders

¶19 The grandmother argues that the circuit court erred in failing to grant her June 2014 motion to dismiss the petitions based on the existence of protection orders issued by a Washington state court that prohibited the father from having contact with the children.[3] According to the grandmother, Wisconsin law required that the circuit court enforce the Washington protective orders and, as a result, the court should have dismissed the petitions because the orders prohibited the father from contact with the children, and therefore he could not have primary custody and placement of them.

¶20 There are several fatal flaws in this argument. First, as our summary of the background reveals, the grandmother's June 2014 motion long pre-dated the 2016 filing of the petitions challenged in this appeal. To repeat, in 2015 the father

[3] There is some confusion in the parties' briefing as to the date of issue of the Washington protective orders that are the subject of the grandmother's argument on appeal, and the record provides no answer that we have found. However, based on our resolution of this issue on appeal, the date of the pertinent protective orders does not matter to our analysis.

Separately, the father points out that there is no written motion in the record corresponding to a June 2014 motion by the grandmother, and the grandmother fails to provide a pertinent record cite. However, in a written order dated June 30, 2014, the circuit court stated that, at a pre-trial hearing in June 2014, the grandmother had moved to dismiss the petitions that were then pending, based on the foreign protection orders, and the court denied that motion.

voluntarily dismissed petitions he had pending at that time, with leave by the court to re-file the petitions after the criminal charges against the father were resolved. After 2015, the grandmother did not make any motion to dismiss based on the Washington protective orders as it relates to the petitions filed in 2016 that are the subject of the circuit court order now under review.

¶21 Second, contrary to the position that the grandmother now takes on appeal, when the court and the parties discussed the Washington protective orders at the March 2017 pre-trial hearing on the current petitions, neither the grandmother's attorney nor the guardian ad litem made a motion to enforce these orders. Further, when the court asked at that same hearing if there was *any* court order in effect that would prevent the father from having placement of the children, the guardian ad litem responded that there were no such orders in place and the grandmother made no objection to this statement.

¶22 Finally, we observe that the grandmother's argument that the circuit court erred in failing to properly apply WIS. STAT. § 813.128 to her June 2014 motion may fail because § 813.128 was not effective until April 13, 2016.[4]

Ability Of Social Worker To Testify To Fitness

¶23 The grandmother argues that the circuit court erroneously exercised its discretion in allowing the testimony of the social worker who was called by the father to give expert testimony regarding the father's diagnosis of post-traumatic

[4] We do not address the potential effect of the predecessor statute, WIS. STAT. § 806.247 (2013-14), because neither party develops an argument on the topic of whether the court was asked to, or could have, applied the predecessor statute under circumstances as they then existed.

stress disorder (PTSD) and other related subjects because, according to the grandmother, the social worker was not qualified to testify as to the ultimate issue of whether the father was a fit parent. We resolve this issue based on forfeiture.

¶24 As the circuit court summarized, the social worker testified at trial regarding PTSD in general, as well as the specifics of the father's PTSD diagnosis, including his treatment progress as of the date of the trial. The social worker testified that she believed that the father could care for his children, and that he presented a low risk to himself and others, given his success in treatment to date.

¶25 In his response brief, the father points out that the grandmother did not object at trial to the social worker's qualifications to testify on the topic of the father's fitness as a parent. As the circuit court noted in its order denying the grandmother's motion to reopen the evidence, the grandmother did not object at trial to the substance of the social worker's testimony by making a ***Daubert*** objection, but instead objected only to allowing her to testify telephonically. *See* ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993).

¶26 The failure to object at trial constitutes a forfeiture of any possible objection. *See* ***Dostal v. Millers Nat. Ins. Co.***, 137 Wis. 2d 242, 265, 404 N.W.2d 90 (Ct. App. 1987) (failure to object to evidence at time of trial constituted forfeiture) (citation omitted). The grandmother fails to respond to the father's forfeiture argument, which we deem a concession. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession). Given the failure to object and the nature of the argument on appeal, we decline to reach the argument on its merits.

¶27 Moreover, we observe that the grandmother's argument would likely fail even if we were to address its merits. The grandmother frames her argument in terms of the qualifications of the expert and testimony as to ultimate issues. *See* WIS. STAT. §§ 907.02, 907.04. However, the substance of her argument challenges to the *credibility* of the social worker and the *weight* her testimony deserved, rather than its admissibility. The circuit court made an explicit finding that the social worker's testimony was credible and we defer to circuit courts on credibility and weight-of-evidence determinations. *See* ***State v. Randall***, 2011 WI App 102, ¶14, 336 Wis. 2d 399, 802 N.W.2d 194 (we defer to the circuit court's credibility determinations). "When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony." ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998).

Burden Of Proof To Terminate Guardianship

¶28 The grandmother asserts that the father failed to meet his burden of proof to establish by clear and convincing evidence that the guardianships should be terminated. However, she fails to provide us with, or apply, the proper standard of review and fails to develop a legal argument. Instead, the grandmother effectively requests, based on snippets of evidence, that we substitute our opinions as to the weight and credibility of various pieces of evidence for the opinions of the circuit court. As stated above, we defer to the circuit court's credibility determinations and determinations as to the weight to give to evidence.

New Trial In The Interest Of Justice

¶29 The grandmother asks that we remand for a new trial in the interest of justice because the circuit court was biased in the father's favor. For the most part, this argument consists of arguments that we have already discussed and rejected above. To these arguments, the grandmother adds the contention that the court demonstrated bias when it gave some leeway to the father on procedural issues, based in part on the fact that the father represented himself. According to the grandmother, the father "should have been treated the same whether he had an attorney or not." We disagree. Courts should not abandon their neutrality and develop arguments for pro se litigants, but may grant some leniency to pro se litigants. *See* ***Waushara Cty. v. Graf***, 166 Wis. 2d 442, 451-52, 480 N.W.2d 16 (1992); ***Larson v. Burmaster***, 2006 WI App 142, ¶47, 295 Wis. 2d 333, 720 N.W.2d 134.

¶30 Here, we see no indication in the record that the circuit court abandoned its neutrality and developed arguments for the father. Instead, in the ordinary fashion the court ruled on objections and motions, sometimes ruling in favor of the father. The grandmother fails to point to evidence of the type that is sufficient to meet the burden necessary to overcome the presumption against bias. *See* ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298 ("We begin with a presumption that the judge is free of bias and prejudice and the burden is on the party asserting judicial bias to show by a preponderance of the evidence that the judge is biased or prejudiced.") (citation omitted).

"Other Compelling Reasons" To Continue Guardianships

¶31 The grandmother argues that, "under ***Barstad***," the circuit court "should have found [that] there were other compelling reasons to continue the guardianships." *See* ***Barstad v. Frazier***, 118 Wis. 2d 549, 568, 348 N.W.2d 479 (1984) ("in custody disputes between parents and third parties," court should award a parent custody except when a parent is "unfit," "unable to care for the children," or "there are compelling reasons," including abandonment, neglect, extended disruption of parents' custody, "or other similar extraordinary circumstances"). As the ***Barstad*** court observed, "[c]ustody determinations [by circuit courts] are based on first-hand observation and experience with the persons involved and therefore the discretionary decisions of the trial court are given great weight on appeal." ***Id.*** at 554. Thus, we will reverse a court's custody award on appeal only if we are "convinced that the findings of fact upon which the custody determination is based are clearly erroneous ... or that the custody determination represents a clear [erroneous exercise] of discretion." ***Id.*** As we now explain, we are not convinced that the circuit court here relied on erroneous factual findings or made an erroneous discretionary determination.

¶32 The grandmother cites to the following facts in support of her "compelling reasons" argument: that the father was charged with sexual assault, even though the charges were ultimately dismissed and not reissued; that a speech pathologist testified that the children's speech was developmentally delayed; that the guardian ad litem recommended that the guardianships continue; and, that the children's mother testified that the father used domestic violence to control her when they were together. We conclude that the grandmother's "compelling reasons" argument amounts to a statement of dissatisfaction with the circuit

court's decisions not to give more weight to the testimony of the grandmother and her trial witnesses.

¶33 The circuit court made numerous and detailed findings supporting its decision to terminate the guardianships, including a finding that the grandmother was "on the whole" "[not] credible" in her testimony. The following are further examples of the court's pertinent findings. Regarding the concerns surrounding the sexual assault and domestic violence allegations against the father, the court placed weight on the fact that the father's "treatment provider does not consider him to be a threat to himself or others." Explaining further, the court found that the father "has recognized his PTSD, engaged in treatment, and made significant progress" and that, based on all of the testimony and exhibits offered at trial, "there is no evidence that [the father] poses a threat to the children as a result of PTSD, or mental illness." Regarding the alleged sexual assaults specifically, the circuit court noted that the forensic interviewer who investigated the allegations reported that the allegations were "fishy," and the court walked through a detailed series of facts which the court characterized as raising "serious questions about the allegations." Based on this detailed review of the allegations, the court concluded that the "unproven allegations of sexual assault cannot be used to deny [the father] placement of these children." Again here, the grandmother effectively asks us to substitute our judgment regarding the weight of the evidence and the credibility of witnesses for that of the circuit court.

CONCLUSION

¶34 For these reasons, we affirm the order of the circuit court terminating the grandmother's guardianships of the children and awarding custody and primary physical placement to the father.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.