COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1387

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

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

BARRON COUNTY,

PETITIONER-RESPONDENT,

V.

JANET S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Janet S. appeals orders terminating her parental rights to Michael R. and denying her motion for a new fact-finding trial. She argues that she is entitled to a new trial, a new dispositional hearing and the appointment of a new guardian ad litem (GAL) for Michael. This court affirms both orders.

¶2 Janet identifies eleven major issues on appeal, as well as additional sub-issues. This court declines to address all of these arguments individually.[2] Instead, this court will address her arguments as they relate to the following issues: (1) alleged errors during the jury trial, including alleged deficiencies in the GAL's, district attorney's and trial court's performances; (2) ineffective assistance of trial counsel; and (3) the trial court's decision to terminate Janet's parental rights.[3]

BACKGROUND

¶3 Janet's son, Michael, was removed from her home in April 1996 after an incident where Janet became intoxicated, threatened to kill herself and was temporarily taken into custody pursuant to WIS. STAT. ch. 51 mental commitment procedures. In June and July, Janet had several additional contacts with law enforcement when she had been drinking. The County subsequently filed a child in need of protection or services (CHIPS) petition pursuant to WIS. STAT. § 48.13, alleging that Janet was unable for reasons other than poverty to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] This court need not address each and every issue raised on appeal. *See* ***State v. Waste Mgmt.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

[3] At the outset, this court notes that although Janet alleges many trial errors in support of her motion for a new trial, she does not challenge the sufficiency of the evidence presented at trial. Thus, because this court affirms the trial court's order denying her motion for a new trial, it also affirms the jury verdict.

provide the necessary care for Michael, as defined by § 48.13(10). In August, the trial court found that grounds for the petition existed and ordered that Michael remain in foster care. The court's order indicated that Michael could not return to Janet's home until a variety of conditions were satisfied.[4] These conditions included that Janet remain sober and chemical free and refrain from further law violations.

¶4 In the first year following the dispositional order, Janet continued to experience problems with alcohol and again threatened suicide. In January 1997, police were called to her home after Janet swallowed some pills. She was placed on emergency detention so that she could undergo a psychiatric evaluation. In May, police officers responding to a complaint found Janet and several other individuals drinking beer in a park; Janet was intoxicated. Several days later, law enforcement responded to a call from Janet's residence. When the police arrived, Janet's daughter Sheila ran outside and told the officers that Janet was beating up Sheila's father. Janet, who was intoxicated at the time, was arrested. Throughout the year, Janet had successful supervised visits with Michael, who remained in foster care.

¶5 In August, the dispositional order was extended for another year. The trial court ordered that before Michael could return home, Janet had to maintain sobriety, comply with an outpatient after-care treatment program for drugs and alcohol abuse, attend Alcoholics Anonymous meetings, refrain from

[4] The dispositional order also imposed conditions on Michael's father, Archie R., who lived elsewhere and had little contact with Michael. It appears that Archie did not actively participate in the CHIPS proceedings and did not defend the subsequent petition to terminate his parental rights. His rights were ultimately terminated and are not at issue in this appeal.

further law violations, and maintain an appropriately-furnished, non-hazardous residence for at least six months.

¶6 In October Janet had two contacts with law enforcement. She was arrested for bail jumping after acting disorderly at a bar. Janet attended an intensive five-week outpatient alcohol abuse program starting in January 1998. At some point, she also attended AA meetings for several months. In September 1998, the dispositional order was extended for another year to August 1999, with similar conditions placed on Janet for Michael's return to the home. The order also provided that Janet could continue having supervised visits with Michael on a bi-weekly basis, with transportation provided by the County.

¶7 In spring 1999, Janet moved into a home with her fiance, Jack H. In July, she called the police and told the dispatcher that she had a knife to her chest. Janet was placed in emergency detention and taken to the hospital. The responding officer testified at trial that Janet told him she was having problems with Jack, was depressed and had tried to use the knife to hurt herself.

¶8 In August 1999, the dispositional order was again extended for one year. One month later, the County filed a petition to terminate Janet's parental rights, alleging that Michael was in continuing need of protection and services, a ground for termination pursuant to WIS. STAT. § 48.415(2). Janet contested the petition, and a fact-finding trial was held in January 2000. The jury found that grounds for termination existed. Two months later, the trial court concluded that Janet's parental rights should be terminated.

¶9 With the assistance of her trial counsel, Janet filed a notice of intent to appeal. Janet changed lawyers and appealed both the jury verdict and the dispositional order terminating her parental rights. In the course of preparing the

appeal, Janet's appellate counsel filed a motion for a new trial with the trial court. Counsel asked this court to extend the appellate briefing schedule so that the trial court could hear her motion. This court construed her motion as a request for remand and remanded for a hearing on Janet's motion for a new trial.

¶10 Janet presented several issues to the trial court, including her allegations of deficiencies and errors by the trial court, her trial attorney and the GAL. Because Janet alleged ineffective assistance of trial counsel, the court conducted a ***Machner***[5] hearing. Ultimately, the trial court rejected Janet's motion for a new trial and found that neither the trial court, her trial counsel, nor the GAL had acted deficiently.[6] Janet resumed her appeal to this court.

MOTION FOR NEW TRIAL

¶11 Janet contends that the trial court erred when it denied her motion seeking a new trial pursuant to WIS. STAT. § 805.15(1). Pursuant to § 805.15(1), a party may move to set aside a verdict and for a new trial (1) because of errors in the trial; (2) because the verdict is contrary to law or to the weight of evidence; (3) because of excessive or inadequate damages; (4) because of newly-discovered evidence; or (5) in the interest of justice. Although Janet does not explicitly identify which of these grounds she is relying on, her brief alleges numerous errors

[5] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[6] The trial court also concluded that Janet's motion for a new trial was untimely because it was not brought within 20 days of the trial as required by WIS. STAT. § 799.28(1). Janet argues that the motion was not brought within 20 days because trial counsel was ineffective. She also argues that she seeks a new trial on grounds of newly-discovered evidence, which allows motions to be brought within one year. *See* WIS. STAT. § 799.28(2). This court declines to address whether the motion was timely because even though the trial court concluded the motion was untimely, it nonetheless considered whether there were sufficient grounds for a new trial and concluded there were not. Because this court affirms the trial court's conclusion that there were insufficient grounds for a new trial, the timeliness issue is irrelevant.

committed by trial counsel, the trial court, the district attorney and the GAL at the trial. Accordingly, this court will assume Janet seeks a new trial based on errors in the trial.[7]

¶12 A motion for a new trial is addressed to the sound discretion of the trial court, and this court will not reverse the trial court's decision unless it erroneously exercised its discretion. *See* ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). When procedural errors are alleged, this court affirms the trial court's ruling unless the alleged errors have affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial. *See* WIS. STAT. § 805.18(2).[8]

¶13 Janet alleges numerous errors in the trial, such as improper voir dire and improper reference to her history of alcohol abuse. She also alleges that the trial court, the district attorney and the GAL acted improperly and deficiently. This court has carefully reviewed the entire record and concludes that the trial court reasonably exercised its discretion when it denied Janet's motion for a new

[7] Janet also suggests in her reply brief that she is entitled to a new trial because of newly-discovered evidence. However, she fails to outline how she satisfied the five-part test for establishing grounds for a new trial based on newly-discovered evidence. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990) (outlining five-part test). Accordingly, we reject this argument. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980) (arguments unsupported by authority will not be considered).

[8] WISCONSIN STAT. § 805.18(2) provides:

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for 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.

trial. This court will briefly examine the myriad errors Janet alleges and its reasons for rejecting her arguments.

¶14 First, Janet argues that the trial court erred when it conducted the majority of voir dire. She cites no authority for her contention and actually acknowledges that the rules of civil procedure, case law and local practice provide for the court conducting voir dire. She argues, however, that it was error for counsel and the trial court to agree to this format because the attorneys should have had an opportunity to ferret out particular prejudices and biases related to their positions in the case. This court rejects Janet's entire argument because she has cited no authority for her reasoning. This court will not develop her argument for her and need not consider it further. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

¶15 Second, Janet argues that the trial court should not have allowed jurors to ask the witnesses questions during the trial.[9] Janet acknowledges that the rules of civil procedure allow for juror questions, but contends that this should be impermissible for TPR trials because jury questions infringe on the "strategic province and responsibility of the parties' attorneys." She cites no authority for her argument that allowing the jurors to ask questions constitutes grounds for a new trial, or that allowing jury questions in a TPR case is error. This court need not consider this argument further. *See* ***id.***

¶16 Next, Janet contends that WIS. STAT. § 971.13, a criminal statute relating to competency, should apply to this case, even though this is not a

[9] The jurors submitted written questions to the trial court that were shown to the parties and open to objection before they were read to the witnesses.

criminal case. Specifically, she argues that because there was testimony suggesting that she is borderline mentally retarded, the district attorney, trial counsel and the trial court all should have raised the issue of Janet's competency. Janet fails to cite any authority for her argument that this court should extend § 971.13 to TPR cases. Thus, this court need not address it. Additionally, this court notes that although Janet raised this issue at the ***Machner*** hearing, she has offered no evidence that she is mentally retarded or that she "lacks substantial mental capacity to understand the proceedings or assist in … her own defense," the standard established by WIS. STAT. § 971.13(1). Thus, there is no factual basis in the record to which this court could apply the statute.

¶17 Janet also argues that the trial court erred "by predetermining as early as the jury trial what the disposition or 'best interests' outcome should be." She states that although the court was aware through its handling of the CHIPS case that Janet had an alcohol problem, "it never on its own volition or via the Department modified or heightened the treatment-related conditions" for Janet. She argues, "If [Janet] couldn't see her way to stay sober ... it was the Court's responsibility to raise the bar in order to effect ... *mandated reunification*." She also argues that although the trial court rejected the County's motion for directed verdict on two issues, its comments at the time suggested the trial court had predetermined what the disposition of the case should be. This court rejects Janet's argument without further discussion because it does not appear that she raised this issue at the trial court.[10] *See* ***Wirth v. Ehly,*** 93 Wis. 2d 433, 443-44,

[10] Janet's appellate brief contains no citation to the record or transcript on this issue. We stress that it is not this court's duty to "sift and glean the record *in extenso* to find facts which will support an [argument]." *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990). Nonetheless, this court examined Janet's trial court brief and the numerous transcripts and cannot find any reference to this argument.

287 N.W.2d 140 (1980) (an appellate court will generally not review an issue raised for the first time on appeal). This is especially crucial because raising this issue to the trial court would have allowed it an opportunity to explain its statements.

¶18 This court rejects Janet's next argument for the same reasons. She argues that the trial court erred when it introduced the GAL to the jury as an attorney with a "special duty" in the case and when it introduced the police officers after commenting on their "special role" in the community. Janet did not object to this introduction during the trial and did not raise the issue in post-judgment hearings, so the trial court has not been afforded the opportunity to explain its choice of words.

¶19 Next, Janet contends that the district attorney and the GAL committed "purposeful, negligent, irresponsible or inadvertent trial errors by repeatedly mischaracterizing facts, evidence, and testimony, referring to pre-CHIPS acts" and other information. For example, she argues that the district attorney should not have been allowed to elicit testimony about interactions with law enforcement that took place before the August 1996 dispositional order was issued. Although Janet cites specific statements made by the GAL and the district attorney, her argument on this issue is devoid of any legal authority that would guide this court in its analysis. Accordingly, this argument will not be considered. *See* ***Shaffer***, 96 Wis. 2d at 546.

¶20 Next, Janet argues that contrary to a suppression agreement, the trial court allowed the jury to hear evidence that Janet has other children. The agreement was not recorded so the terms of any agreement are unclear. However, if there was an agreement, this court's review of the transcript leads it to conclude

that any reference to the children (and any decision by the parties not to seek a curative instruction), was harmless error. Several times during the trial, witnesses (including Janet herself) briefly mentioned two of Janet's other children. There was no suggestion that the children were the subject of any CHIPS or TPR actions. However, Janet was asked one juror question about her daughter: whether the daughter lived with her. Janet answered no. Janet now argues that jurors were left to speculate about the other childrens' location and status. She continues, "This does not appear allowable and would appear to be trial error requiring new proceedings." She cites no authority for her argument and has not explained why allowing the references was prejudicial. Consequently, this court is not persuaded that any prejudicial error occurred.

¶21 Finally, Janet contends that she is entitled to a new trial because the GAL provided ineffective assistance to her son. Specifically, Janet claims that the GAL ignored Michael's best interests during pre-trial investigation, trial and the dispositional hearing. The parties spend significant time discussing whether Janet has standing to raise this issue and which standards should govern an evaluation of the GAL's performance. This court concludes that although Janet can raise the issue of the GAL's performance at the trial court, she is not entitled to a ***Machner***-type hearing on the GAL's performance.

¶22 Our supreme court recently discussed the distinctive role of a GAL representing the best interests of a child in ***Paige K.B. v. Molepske***, 219 Wis. 2d 418, 580 N.W.2d 289 (1998). The issue presented in that case was whether a GAL appointed by the court under WIS. STAT. § 767.045 to represent the best interests of a child in a custody dispute was entitled to quasi-judicial immunity from liability for negligence in performing his or her statutory duties. *See* ***Paige***, 219 Wis. 2d at 421-22. The court decided that it was entitled to quasi-judicial

immunity. *See* ***id.*** In reaching this conclusion, the court first defined the role of the GAL and distinguished this from the role of an attorney representing an individual.

¶23 The role of the GAL as provided in WIS. STAT. ch. 767 is to advocate the best interests of the child. *See* ***Paige***, 219 Wis. 2d at 427. The court stated that this meant the GAL did not represent the child per se and was not bound by the wishes of the child. *See* ***id.*** The statutory function of the GAL, the court next observed, "is intimately related to that of the circuit court," which, like the GAL, is to determine and protect the best interests of the child. *See* ***id.*** at 428-29. The court described the GAL as "essentially function[ing] as an agent or arm of the court." *See* ***id.*** at 430.

¶24 Although this is a TPR proceeding, rather than a custody dispute incident to divorce, this court concludes that the GAL's function is essentially the same. The trial court has the responsibility of overseeing the GAL's conduct and may, on its own or at the request of a party, remove and replace the GAL. *See* ***id.*** at 434. Because the trial court has discretion to oversee and guide the GAL's conduct, the remedy for a party who believes the GAL is performing deficiently is to raise the issue with the trial court.

¶25 Janet's trial counsel did not object to the GAL's conduct, so her argument with respect to the GAL's performance would generally be waived. However, she raised it in her motion for a new trial, alleging that trial counsel was ineffective for not objecting to the GAL's performance. The trial court therefore discussed the GAL's performance, and this court will briefly address it as well.

¶26 Janet raises four specific complaints about the GAL's performance: (1) The GAL should have met personally with the child; (2) the GAL's trial

performance was deficient because he gave no opening statement, did not call any witnesses and "asked few if any relevant questions"; (3) the GAL should have asked the court "that the bar be raised for [Janet's] alcohol treatment" in order to work toward reunifying the family; and (4) the GAL should have moved the court for an increase in contact between Janet and Michael. The trial court rejected each of her arguments, concluding:

> I find that [the GAL's] conduct is one that has to be viewed in light of his entire representation of Michael during all the CHIPS cases, that it is a cumulative and a collective knowledge that is developed over a period in this case of years of working with the same parties and the same families and being able to come to a conclusion that assists the Court at the time of the termination of parental rights.
>
> … The whole purpose of the [GAL] is to understand the child, understand the child's needs, understand what this child has been through and everyone that's been involved in these cases over a period of years.
>
> ….
>
> The [GAL] represented those best interests of the child. I suppose if I wanted to get picky, I could say that I wish [the GAL] would have done this or that, but I don't think even if he would have done some of the things that [Janet] asked or [Janet] criticized him for that the outcome of the case would have been any different. … Would any of this change the outcome of the case? I think not. … I don't think that anything that he did in this case would cause the Court to have any grave concern about his ability to serve as [GAL] in this case or any case in the future.

Because the record discloses a rational basis for the court's ruling, this court concludes that the trial court did not erroneously exercise its discretion when it denied Janet's motion for a new trial on grounds that the GAL acted deficiently.

¶27 Janet contends that the GAL should have met personally with the child. There is no statutory requirement that a GAL in a TPR proceeding meet with the child or speak to the child about how the child feels about the parent or about termination of parental rights. There is a requirement that a GAL in a CHIPS action,

> [u]nless granted leave by the court not to do so, personally, or through a trained designee, meet with the child … assess the appropriateness and safety of the environment of the child and, if the child is old enough to communicate, interview the child and determine the child's goals and concerns regarding his or her placement.

See WIS. STAT. § 48.235(3)(b)1. This statute does not require that the GAL himself speak with the child; "a trained designee" may do so instead. More importantly, this statute plainly applies only in a CHIPS proceeding; there is no similar obligation in a TPR proceeding. Accordingly, the GAL in this case was not required to meet with Michael and, instead, could reasonably rely on the reports of social workers and the foster parents in forming his opinions.[11]

¶28 Janet contends the GAL performed deficiently at trial because he declined to give an opening statement, did not call any witnesses and asked few questions. The GAL's own brief best answers these complaints:

> The fact-finding hearing is to determine whether grounds for terminating parental rights exist. The best interests of the child is not a factor to be addressed or determined at the fact-finding hearing. It was no secret at and before the jury trial, the position of the [GAL] was aligned with the [County's] position on all issues. It must also be noted that the [GAL] in all matters, procedurally and otherwise, follows in order the [County] and counsel for Janet S.
>
> ….
>
> The [GAL's] questioning of witnesses, or lack thereof, was and is dependent upon the thoroughness of those that preceed him. It was not necessary to ask repetitive questions ….

[11] This court does not suggest that trial counsel is precluded from questioning a GAL about his or her recommendation. Whether the GAL met with the child and the bases for his or her recommendation are appropriate issues for examination. If the GAL's opinion lacks credibility, the trial court may weigh that when making its ultimate determination of the child's best interests.

This court agrees. The GAL was not required to call witnesses or ask additional questions. Indeed, given the GAL's support of termination, it is unlikely that another slate of witnesses against Janet would have helped her case.

¶29 Janet's third complaint suggests that the GAL had an independent duty to actively encourage the trial court to impose conditions that would force Janet to be sober. This court rejects this suggestion. Although the GAL advocates for the best interests of the child and may suggest, support or oppose certain conditions, the GAL is not responsible for forcing Janet to be sober. Moreover, the trial court did require that Janet remain sober and conditioned Michael's return on her compliance; she failed to meet that condition despite the high cost of failure.

¶30 Janet's fourth complaint is that the GAL should have moved to increase contact between Janet and Michael. This court rejects this contention. Janet herself could have sought increased contact; she has cited no evidence that she did so. Additionally, the GAL is not required to suggest increased contact if he concludes it is contrary to the child's best interest. Janet has not convinced this court that the GAL's recommendations were unreasonable.

¶31 In summary, this court concludes that the trial court did not erroneously exercise its discretion when it denied Janet's motion for a new trial on grounds that there were errors during the jury trial, including alleged deficiencies in the GAL's, district attorney's and trial court's performances.

INEFFECTIVE ASSISTANCE OF COUNSEL

¶32 Next, Janet argues her trial counsel provided ineffective assistance by failing to (1) object to errors at trial; (2) demand that the GAL give bases for

his opinion; and (3) call two witnesses at trial. Janet devotes only two paragraphs of her fifty-page brief to this argument and fails to cite any case law with respect to effective assistance. She simply concludes that trial counsel "did not meet the bar of 'zealous advocacy' required by normal practice of law." Additionally, she does not explain how any alleged errors specifically prejudiced her case. This court declines to develop her argument for her. *See* ***Shaffer***, 96 Wis. 2d at 546. This court is confident, having examined the entire record, that the trial court was correct when it concluded that there was nothing demonstrated at the ***Machner*** hearing that would allow a court to find that Janet has established grounds for relief based on ineffective assistance of counsel.

THE TRIAL COURT'S DECISION TO TERMINATE

¶33 Finally, this court considers Janet's argument that the trial court erred by not accepting as unrefuted expert testimony that termination was not required. In effect, Janet is challenging on a single ground the trial court's discretionary determination that Janet's parental rights should be terminated. Janet contends that the testimony she presented by a specialist in family preservation that termination would be detrimental was unrefuted. This court disagrees.

¶34 The trial court had before it a written report from the County Department of Human Services, signed by a social worker and program manager, that recommended termination and discussed in detail the reasons for that recommendation. The GAL also recommended termination. It was within the trial court's discretion to weigh the evidence and determine whether to terminate Janet's parental rights. Because Janet does not challenge any other portion of the

trial court's decision, this court affirms without further discussion the trial court's decision to terminate Janet's parental rights.

By the Court.—Orders affirmed.

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