COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 2004

Cornelia G. Clark
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. 03-2660 **Cir. Ct. No. 03TP000005**

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

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

WINNEBAGO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DIANE M.,

RESPONDENT-APPELLANT,

MARK J.M.,

RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

¶1 BROWN, J.[1] In this appeal of a termination of parental rights judgment, Diane M. takes aim at the guardian ad litem. She claims that the GAL violated case law prohibiting him from arguing to the jury that it consider the child's best interests when determining whether grounds for termination exist, "aligned himself" with the jury by implying to the jurors that he was a fact finder just like them, erroneously participated as a party without aligning himself with either the Winnebago County Department of Health and Human Services or Diane, and should not have been able to cast independent peremptory challenges in picking the jury. Because her trial counsel raised none of the above issues, she makes these arguments under the guise of ineffective assistance of counsel. We hold that the GAL did not inject "best interests of the child" into the jury trial, did not improperly influence the jury by implying that he was in league with them, was not obligated to align himself with one party or the other before the start of the trial and was properly allowed peremptory challenges. We reject the ineffective assistance claims and affirm.

¶2 The County brought the action against Diane by alleging that her son, Mark J.M. (MJ), was a child in need of continuing protection and services and was not likely to satisfy the conditions for return within the next twelve months. A jury trial was conducted on the issue of whether the child was in need of continuing protection and services and the GAL participated. The jury found against Diane. She lost at the disposition phase and the trial court terminated her parental rights. She brought a postconviction motion alleging the above-cited issues and was unsuccessful. She now appeals.

[1] This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 Diane correctly cites the law of ineffective assistance of counsel. To prevail, she must show that her trial counsel's performance was deficient and that such deficient performance prejudiced her. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W. 2d 379 (1997). The first prong requires a showing that her counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, while the prejudice prong requires a showing that counsel's errors were so serious as to deprive her of a fair trial, the result of which is unreliable. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶4 Whether her counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Weber***, 174 Wis. 2d 98, 111, 496 N.W. 2d 762 (Ct. App. 1993). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id***. We will now discuss each of Diane's arguments in turn, supplying whatever facts are necessary.

Injecting "Best Interests" into the Jury Trial

¶5 Diane's first claim is that on several occasions, the GAL injected best interests into the jury trial. Diane begins by citing ***Waukesha County Department of Social Services v. C.E.W.***, 124 Wis. 2d 47, 70, 368 N.W. 2d 47 (1985), where the supreme court stated: "The guardian ad litem cannot, of course, invoke the best interests of the child in statements to the jury." This is because the jury can only decide whether any grounds for termination have been proven. The court decides best interests. WIS. STAT. § 48.424(3).

¶6 Diane points to several statements made by the GAL where she claims that the GAL violated this law. In both his opening and closing statements

to the jury, the GAL informed the jury that his "primary duty is to look out for the best interest of this child." The GAL also said, "[t]he star of the show today is a little boy who is about 2-½ years old." And, "[y]ou have seen the picture of MJ and I think this is really what this case is about … it boils down to MJ." And, "[b]ecause we are talking a 2-year-old, 2-½-year-old little boy[, w]e don't want to come back in five years, three years or four years when this guy is five or six years old and has spent six years in foster care. We don't want to do that. We want to address it now." And, "[d]o you think it is fair to MJ that the possibility exists he could spend the remainder of his life in foster care? Is that fair to this little kid?" And, "[w]hose world do you think MJ wants to live in? We have a situation where he is three years old and three months. If there is any action, it has to be now." And, "MJ has a great future but to experience that, he needs you. You are his savior. Don't deny him that."

¶7 None of these statements were objected to by counsel. Diane claims counsel was ineffective because, while ***D.B. v. Waukesha County Human Services Department***, 153 Wis. 2d 761, 769-70, 451 N.W. 2d 799 (Ct. App. 1989), does allow a GAL to introduce himself or herself as "the attorney appointed by the court to represent the best interests," the totality of the GAL's other comments show that the GAL went well beyond what the law allows.

¶8 We have read the record and, in particular, the opening and closing statements of the GAL. We disagree with Diane's characterization of the GAL's comments. Rather, we wholeheartedly agree with the County's characterization. The "star of the show" comment was made during the GAL's opening remarks. As pointed out by the County, the GAL went on to relate the history that resulted in the bringing of this action—he has been placed out of the home two-thirds of his young life. All the GAL was doing was stating the obvious—that the

termination proceeding involved MJ and whether he was in continuing need of protection and services plus a reference to the history of the case. In no way can it be considered a plea for the jury to consider MJ's best interests.

¶9 The comment about MJ's picture and the reference to the case "boiling down to" MJ is, again, nothing more than a reference to the obvious—that the trial is about the effect of Diane's lack of parenting skills on her son.

¶10 The statement during the GAL's closing that "we don't want to come back in … three years or four years when this guy is five or six years old" is, when taken into context with the rest of the GAL's statements preceding this one, a conclusion based on the fact that there existed overwhelming evidence in the record showing Diane's inability to meet the conditions of return. The supposition is that if the jury does not find that facts exist this time, it is only going to continue next time. There is nothing in the law forbidding parties' lawyers from commenting about what the facts adduced from the testimony mean in light of common sense and human experience. The GAL's comment was merely a request to jurors that they consider Diane's past pattern of conduct as an indicator of future inability to become an effective parent, thus meeting the conditions of return.

¶11 We next consider the GAL's rhetorical question asking whether it is fair that MJ could possibly spend the remainder of his life in foster care, given the continuing inability of the parents to meet the conditions of return. We do not agree with Diane that this is tantamount to an implication that the jury should consider the child's best interests in reviewing the evidence. Rather, we view the statement as an observation that MJ's interests require the jury to answer the questions from the evidence. Likewise, the statement rhetorically asking whose

house MJ wants to live in and the comment that the jury is his savior is simply a zealous way of saying that MJ's interests require the jury to answer the questions based on the evidence presented.

¶12 But even if it is possible that the GAL meant it to be a reference to MJ's future best interests, this court is unconvinced that the jury took it that way. First, the term "best interests" was never used. Second, trial counsel said he did not think the jury was really paying attention to the GAL and so he was not going to object and thereby draw attention to the comments. We consider trial counsel's decision to be a matter of strategy. We were not at the jury trial and neither was Diane's appellate counsel. Trial counsel was in the best position to make the critical choice at that place and time about how observant he saw the jury to be and we will honor that choice. We conclude that counsel was not ineffective in failing to object to what Diane terms to have been an injection by the GAL of best interests.

Whether the GAL "Aligned Himself with the Jury"

¶13 Diane next posits that a GAL must align himself or herself with either the County or Diane and may not "sit as a fact-finder" in termination cases. As such, she argues the GAL "aligned himself" with the jury because he said to the jury, "Now, I am like you in a way. I am going to sit and I am going to listen to all of the witnesses and at the end of that testimony all the lawyers here will have a closing argument, and in that closing argument that I have I am going to make a decision after I have heard the testimony." Diane argues the jury was misled into thinking that the GAL was not a party but a "professional fact-finder." Because her counsel made no objection to this statement, Diane claims he was ineffective.

¶14 Her argument is rejected for several reasons. First of all, even if what Diane says is true, she makes no argument that counsel's failure to object somehow improperly influenced the jury. How the jury could have been influenced by the GAL's statement that he was not going to take a position until after he heard the evidence, we are not told. Thus, Diane has failed to argue the prejudice prong of the ineffective assistance paradigm. That failure alone dooms her argument.

¶15 Second, Diane's sole authority for the proposition that a GAL be required to align himself or herself with one party or the other is WIS. STAT. § 803.01(3), which identifies a GAL as a party to an action. Diane observes that BLACK'S LAW DICTIONARY 1122 (6th ed. 1990) defined "party" as "those by or against whom a legal suit is brought, whether in law or equity, the party plaintiff or defendant, whether natural or legal persons." Diane reads this dictionary definition into the statute and argues that the legislature meant for GALs to either be on one side of the termination case or the other. We refuse to attribute the meaning of the statute based on a definition from BLACK'S LAW DICTIONARY. It is hardly authority that Wisconsin law requires GALs to align themselves at the beginning of trial with either the government or the parent. In fact, Diane admits that, in reality, there is no controlling case law requiring the GAL to align himself or herself with one side before the trial phase of the termination proceeding begins.

¶16 The fact that there is no clear authority for Diane's position is an alternative reason why her "alignment" issue must be rejected. This is because in ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994), we wrote that "ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to

raise the issue." Because Diane has not presented this court with any authority showing that the law or duty is clearly what she claims it to be, trial counsel was not obligated to raise the alignment issue. Thus, her argument must fail.

¶17 Third, we are convinced that Diane's take on the emergent law is one hundred percent backward. Rather than construe the law as being that the GAL must align himself or herself with either the government or the parent before trial, we interpret the law to be headed in exactly the opposite direction. The GAL does not represent the government or the parent. In truth, the GAL does not even represent the child. In a termination of parental right proceeding, the GAL advocates for the *best interests* of the child. ***C.E.W.***, 124 Wis. 2d at 65-66. And in ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 132, 507 N.W.2d 94 (1993), the supreme court wrote that while to date it had not decided whether the child was a party to a termination proceeding, it deemed that the GAL's role is as an advocate for the child's best interests and arises from the child being an interested person or party. In coming to this conclusion, the court noted in a footnote that the child has rights generally accorded a party according to statute. *See* ***id.***, n.11. Thus, the law is that the GAL is acting on behalf of the child's best interests, the child being an interested party. Moreover, the ***C.E.W.*** court commented that the interests of the child may not be completely aligned with either the government or with the parent. *See* ***C.E.W.***, 124 Wis. 2d at 64-66. Based on our search of the law, the only logical conclusion we can reach is that the GAL is an independent party and need not align himself or herself with any other party. Diane's argument fails.

Peremptory Challenges

¶18 Diane objects to the fact that the trial court allowed the GAL four independent peremptory challenges and faults counsel for not objecting. She notes

that, eventually, the GAL did become aligned—albeit after the evidence was in—with the County. She complains that it is as if two sides antagonistic to her received four challenges each, thereby doubling hers. She claims that the make up of the jury was unfavorably skewered thereby. She cites ***C.E.W.*** for the proposition that if a GAL is aligned with the County, the GAL should share peremptory challenges with the County rather than be able to exercise independent challenges.

¶19 ***C.E.W.*** is easily distinguished. There, the trial court limited the GAL's participation in the trial. ***C.E.W.***, 124 Wis. 2d at 50. The county lost and appealed. ***Id.*** One of the issues was the extent to which the GAL may participate in the trial. ***Id.*** at 61. The supreme court did not have to reach that issue because it reversed on other grounds, namely, that the trial court had erred by instructing the jury that it had the power to terminate parental rights. ***Id.*** at 59. But, because the case was going back for retrial, the supreme court believed it necessary to provide the trial court with direction on how to manage the case upon remand. Therefore, the court undertook a general discussion of the duties of the GAL at the jury trial stage of termination proceedings as an advisement mechanism. *See* ***id.*** at 61-69.

¶20 The supreme court therefore took up, among other issues, the question of whether the GAL could exercise peremptory strikes of potential jurors. ***Id.*** at 66-68. The court stated that, "as we understand it, the guardian ad litem has aligned itself with the [county] in the fact finding stage." ***Id.*** at 67. In fact, it appeared that the GAL had aligned itself with the county at the appellate stage as well. *See* ***id.*** at 62, 68. Thus, in ***C.E.W.***, it was undisputed that the County's position and the GAL's position were one and the same. Based on this understanding, it is no wonder that the supreme court advised the trial court how

the GAL should have been permitted to share peremptory challenges with the County at the first trial. The implied message of that advisory comment was to direct the trial court, upon retrial, to give the GAL and the County joint authority in exercising peremptory challenges.

¶21 On those unique facts, ***C.E.W.*** cannot stand for the proposition that, *in every case*, the most the GAL can hope for is a sharing arrangement with either the government or the parent at the peremptory challenge stage of the trial. If anything, ***C.E.W*** stands only for the proposition that when the GAL has declared its alignment with one party or the other, the proper solution is to give the GAL shared powers with the aligned party. The case says nothing about the situation where the GAL has not aligned himself or herself with any party. The ***C.E.W.*** case can hardly be considered authority that Diane may rely upon.

¶22 Rather, what ***C.E.W.***, ***Brandon S.S.*** and WIS. STAT. § 805.08(3) really stand for is that the GAL's role is as an advocate of the child's best interests and arises from the child being an interested person or party. As such, the trial court is required to exercise its discretion in coming to a conclusion about how peremptory challenges are to be allocated. In the case at bar, the trial court carefully considered the GAL's statement that he had not aligned himself with either party. Based on this statement, the trial court exercised its reasonable judgment based on the facts of record and the existing law in holding that the GAL's "role will be the same as everybody here." This determination was not an erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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