COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-2239 **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 & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DIANE L.M.,

RESPONDENT,

MARK J.M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] In this termination of parental rights case, Mark J.M. appeals from an order reversing an order granting him a new trial and reinstating the original order terminating his parental rights. The trial court had initially granted Mark a new trial because he was not advised of his right to substitution of the assigned judge. On appeal, he argues that he is entitled to a new trial on two separate grounds. First, he argues that the trial court erred in holding that based on our supreme court's decision in ***Steven V. v. Kelley H.***, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856, it no longer had a statutory duty to inform a party in a termination of parental rights case of the right to judicial substitution and that ***Steven V.*** could be applied retroactively. Next, he submits that his trial counsel was ineffective for failing to object to the guardian ad litem's opening and closing statements. We hold that ***Steven V.*** does dispose of the requirement that a trial court inform a party in a termination of parental rights proceeding to the right to judicial substitution and the trial court appropriately applied the decision retroactively to Mark. We also conclude that his trial counsel was not ineffective. We affirm.

FACTS

¶2 On February 6, 2003, Winnebago County Department of Health and Human Services filed a petition to terminate the parental rights of both Mark and the child's mother, Diane L.M. Following a three-day jury trial presided over by the Honorable Thomas J. Gritton, a jury found that the child was in continuing need of protection and services. At no time during the trial did Mark's attorney

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

challenge statements made by the guardian ad litem during his opening and closing statements which referenced the best interest of the child. In his opening statement, the guardian ad litem informed the jury that his primary duty was "to look out for the best interest of this child." In his closing argument the guardian ad litem stated:

> And there are a couple of things when we boil this down that I thought was really telling. So we ask them what is the situation and is it going to change? Where are we? Because we are talking a 2-year-old, 2-1/2-year-old little boy. We 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….
>
> In my opening I had mentioned many of us have children and we all want to provide opportunities for those kids, to provide a better life, and I guess looking at it from [the child's] point of view, we have a little boy here like I said in my opening who has spent two-thirds of his life in foster care. Do you think it is fair to [the child] that the possibility exists he could spend the remainder of his life in foster care? Is that fair to this little kid?

¶3 At the conclusion of the dispositional hearing held one month later, the trial court found that both Diane and Mark were unfit parents and terminated their parental rights. On July 28, the court entered a written order terminating Diane's and Mark's parental rights. Both parents filed notices of appeal and postjudgment motions for a new trial. Mark argued that he was entitled to a new trial because the trial court did not notify him of his right to substitute the judge assigned to the action as required by WIS. STAT. § 48.422(5) and ***Burnett County Department of Social Services v. Kimberly M.W.***, 181 Wis. 2d 887, 890-93, 512 N.W.2d 227 (Ct. App. 1994). The trial court agreed and entered an order granting Mark's motion for a new trial on December 23. Mark's appeal was then dismissed. The trial court denied Diane's motion for a new trial. She appealed

and we affirmed the order terminating her parental rights in an unpublished one-judge opinion. ***Winnebago County Dep't of Health and Human Servs. v. Diane M.***, No. 03-2660, unpublished slip op. (Wis. Ct. App. Mar. 10, 2004).

¶4 In February 2004, Mark filed a request for substitution of the assigned judge. His request was granted and the Honorable Bruce Schmidt replaced Judge Gritton. In April, the County filed a motion to reconsider the December 23, 2003 order granting Mark a new trial. The County asserted that ***Steven V.*** overruled ***Kimberly M.W.*** to the extent that it imposed a statutory duty on the trial court to inform a party in a termination of parental rights case of the right to judicial substitution and therefore Mark was no longer entitled to a new trial. Following a hearing on the motion, the court vacated the December 23, 2003 order granting Mark a new trial and reinstated the original July 28, 2003 order terminating his parental rights. Mark filed a postjudgment motion for a new trial. The trial court denied Mark's request for a new trial. Mark appeals.

STANDARD OF REVIEW

¶5 Mark's first claim on appeal is that the trial court erroneously applied ***Steven V.*** retroactively. Whether to retroactively apply the holding of a case is a question of law that we decide de novo. *See* ***State ex rel. Krieger v. Borgen***, 2004 WI App 163, ¶7, 276 Wis. 2d 96, 687 N.W.2d 79, *review denied*, 2004 WI 138, 276 Wis. 2d 30, 689 N.W.2d 57 (No. 03-2733). Mark also raises an ineffective assistance of counsel claim. To show ineffective assistance of counsel, the defendant must show that the attorney's performance was deficient and that such performance prejudiced the defense. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588

N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** at 324-25. However, the ultimate question of effective assistance is one of law, subject to independent review. ***Id.*** at 325.

DISCUSSION

Application of ***Steven V.***

¶6 Mark argues that the trial court erred in applying ***Steven V.*** for two reasons. Mark suggests that ***Steven V.*** did not overrule ***Kimberly M.W.***'s holding that the trial court has a statutory duty to inform a party in a termination of parental rights case of his or her right to substitution of the assigned judge. Next, Mark argues that the retroactive application of ***Steven V.*** would produce inequitable results and is therefore improper. We reject Mark's arguments in turn.

¶7 In ***Kimberly M.W.***, the case upon which Mark based his original motion for a new trial, we relied upon ***M.W. and I.W. v. Monroe County Department of Human Services***, 116 Wis. 2d 432, 441, 342 N.W.2d 410 (1984) ("[t]he statutory direction is unequivocal: … the trial court has the duty to make a full explication of the statutory rights— … the right to request a substitution of judge"), to hold that in a termination of parental rights proceeding, the trial court has a statutory obligation to inform the parent of his or her statutory right to substitution of the assigned judge. ***Kimberly M.W.***, 181 Wis. 2d at 890-92. Further, we engrafted the procedure of ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), for determining whether the trial court's failure to inform was reversible error. ***Kimberly M.W.***, 181 Wis. 2d at 892. Here, Judge Gritton found that Mark did not know of his statutory right to substitution of the assigned judge and ordered a new trial.

¶8 After the new trial was ordered, our supreme court issued its decision in ***Steven V.*** In ***Steven V.***, our supreme court withdrew the language in ***M.W. and I.W.*** imposing a statutory duty on trial courts to inform a parent in a termination of parental rights case of the right of a continuance. ***Steven V.***, 271 Wis. 2d 1, ¶52. However, the court did not stop there. In a footnote, the court wrote:

> As we have noted, Kelley relied for this argument on [***Kimberly M.W.***, 181 Wis. 2d at 892], in which the court of appeals followed [***M.W. and I.W.***], and imported the procedure of [***Bangert***] for determining whether the failure to provide the continuance warning was reversible error. Because it was premised on the overbroad language of ***M.W. and I.W.***, which we have now withdrawn, we overrule ***Kimberly M.W.***

Steven V., 271 Wis. 2d 1, ¶52 n.9. Given this express directive, we must reject Mark's argument that our holding in ***Kimberly M.W.*** requiring the trial court to inform parties in a termination of parental rights proceeding of their statutory right to judicial substitution persists.

¶9 Having established that ***Steven V.*** specifically overruled ***Kimberly M.W.***, we now turn to the question of whether that holding was properly retroactively applied to Mark. Termination of parental rights proceedings under WIS. STAT. ch. 48 are civil proceedings. ***Steven V.***, 271 Wis. 2d 1, ¶32. In civil cases, we presume retroactive application. ***Browne v. WERC***, 169 Wis. 2d 79, 112, 485 N.W.2d 376 (1992). Wisconsin courts generally adhere to the "Blackstonian Doctrine," which asserts that "a decision which overrules or repudiates an earlier decision is retrospective in operation." ***Fitzgerald v. Meissner & Hicks, Inc.***, 38 Wis. 2d 571, 575, 157 N.W.2d 595 (1968). Nonetheless, because retroactive application might be inequitable in certain rare situations, our supreme court has recognized that, occasionally, the better course is

to apply a rule prospectively. ***State ex rel. Brown v. Bradley***, 2003 WI 14, ¶17, 259 Wis. 2d 630, 658 N.W.2d 427; ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 624, 563 N.W.2d 154 (1997).

¶10 Three separate factors bear on the issue of retroactive versus prospective application of a judicial holding. ***Wenke v. Gehl Co.***, 2004 WI 103, ¶70-71, 274 Wis. 2d 220, 682 N.W.2d 405. Those three factors are: (1) whether the decision establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether retroactive application would further or retard the operation of the new rule; and (3) whether retroactive application could produce substantial inequitable results. ***Id.***, ¶71.

¶11 Mark hinges his argument on the third factor, complaining that retroactive application of ***Steven V.*** would produce substantial inequitable results on three grounds. First, he argues that his appeal process has been interrupted by the retroactive application of the case. While Mark is correct that his appeal process has been interrupted, he has not been denied his right of appeal and, more importantly, he is not prejudiced by the delay—the order terminating his parental rights is essentially suspended during the appeal. Second, he complains that Judge Schmidt who presided over the second postjudgment motion did not have the opportunity to observe the witnesses at trial or the jury's response to actions taking place during the trial. We fail to see, and Mark fails to explain, how this fact is even relevant to the question of whether retroactive application of ***Steven V.*** would produce inequitable results.

¶12 Finally, Mark also asserts that because the County did not appeal the December 2003 "final" order granting him a new trial and the "direct appeal period" has run, "it would be inequitable to now allow [the County] to get the retroactive benefit of the holding of [***Steven V.***]." He points out that public policy and the interest of finality do not permit retroactive application to cases in which a final order has been entered and a direct appeal is no longer available. *See* ***State ex rel. Brown v. Bradley***, 2003 WI 14, ¶27, 259 Wis. 2d 630, 658 NW.2d 427.

¶13 Mark's analysis is flawed. WISCONSIN STAT. § 808.03(1) provides in part "[a] final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties." A case is not final if "prosecution is pending, no judgment of conviction has been entered, the right to a state court appeal from a final judgment has not been exhausted, and the time for certiorari review in the United States Supreme Court has not expired." ***State ex rel. Brown***, 259 Wis. 2d 630, ¶27 n.6 (citation omitted). It then follows that an order for a new trial, like the December 2003 order, is a nonfinal order. *See* ***Wick v. Mueller***, 105 Wis. 2d 191, 198, 313 N.W.2d 799 (1982). Because it was a nonfinal order, at the time Judge Schmidt issued his order reversing the December 2003 order for a new trial and reinstating the July 2003 termination order, the County still had the option of either seeking leave to appeal or challenging the order as part of an appeal from an adverse judgment after retrial. S*ee* WIS. STAT. § 808.08(2); WIS. STAT. RULE 809.10(4) ("An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon."). Given that it is a nonfinal order and the County still had the option of pursuing an appeal, the public

policy concerns and the interest in finality that form the basis for Mark's argument are not present and do not preclude the retroactive application of ***Steven V.***

¶14 Because we have not been presented adequate grounds for applying our ruling prospectively, and because we presume retroactivity, the holding in ***Steven V.*** applies to Mark. Mark is therefore not entitled to a new trial based on the trial court's failure to inform him of his right to substitution of the assigned judge.

Ineffective Assistance of Counsel

¶15 Mark challenges, as did Diane in her appeal, the comments the guardian ad litem made to the jury in his opening and closing statements. He asserts, as did Diane, that the guardian ad litem's references to the best interest of the child in his opening and closing statements violate our supreme court's admonition in ***Waukesha County Department of Social Services v. C.E.W.***, 124 Wis. 2d 47, 70, 368 N.W.2d 47 (1985) ("The guardian ad litem cannot, of course, invoke the best interests of the child in statements to the jury."). Accordingly, he maintains, as did Diane, that his counsel should have objected to those statements. While we acknowledge that different counsel represented Diane and Mark, Mark's complaints concerning the guardian ad litem's statements are the same as Diane's. We therefore track the reasoning we used to dispose of Diane's arguments in her appeal and hold that Mark's counsel, like Diane's counsel, was not ineffective in failing to object to the guardian ad litem's statements.

¶16 The guardian ad litem's comment during his opening statement in no way encouraged the jury to make its decision based on the best interests of the child, rather it simply explained to the jury at the outset the role the guardian ad litem plays in the proceedings. *See* ***D.B. v. Waukesha County Human Servs.***

Dep't, 153 Wis. 2d 761, 769-70, 451 N.W.2d 799 (Ct. App. 1989) (holding that the introduction to the jury of the guardian ad litem as "the attorney appointed by the court to represent the bests interests of [the child]" simply explained the guardian ad litem's role in the proceeding and was therefore informative, desirable and not in error). Therefore, the guardian ad litem's statement was entirely appropriate. Furthermore, the statements made during his closing arguments must be read in context. They came in the midst of a lengthy discussion concerning Mark and Diane's past pattern of conduct. The comments were merely a plea to the jurors that they consider Mark and Diane's past pattern of conduct as an indicator of an inability to meet the conditions for return in the next twelve months. The rhetorical questions simply ask the jury to consider the child's interests in light of this evidence. These statements then were consistent with the guardian ad litem's duty to represent the interests of his client, the child.

By the Court.—Order affirmed.

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