COURT OF APPEALS
DECISION
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December 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2887 **Cir. Ct. No. 2011JG304**

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

IN THE MATTER OF THE GUARDIANSHIP OF GIOVANNA P.

STEVE P. AND DONNA P.,

PETITIONERS-APPELLANTS,

V.

MAEGAN F. AND NOEL G.,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Steven P. and Donna P., prospective adoptive parents of Giovanna P., appeal the trial court's order dismissing their third-party

guardianship petition under WIS. STAT. § 54.10 (2009-10).[1] They ask us to amend the standard articulated in ***Barstad v. Frazier***, 118 Wis. 2d 549, 348 N.W.2d 479 (1984), for determining when a third-party should be granted a guardianship, arguing that the current standard, which does not consider the best interests of the child, violates Giovanna's due process rights. However, even if we reject the new standard they propose, Steven and Donna argue that the trial court erred in concluding that Giovanna's birth parents, Maegan F. and Noel G., are fit and able parents. Finally, Steven and Donna argue that the trial court erroneously exercised its discretion in excluding certain evidence from trial.

¶2 We do not have the authority to modify or amend case law from a previous supreme court case. Moreover, we conclude that the trial court applied the correct law as it is currently articulated and properly exercised its discretion, both in determining that Maegan and Noel are fit and able parents and in its evidentiary decisions at trial. Thus, we affirm the trial court's order dismissing Steven and Donna's guardianship petition.

BACKGROUND

¶3 Giovanna P. was born to Maegan F. on November 12, 2010. Maegan has two other children who she has custody of and who she has cared for prior to and since Giovanna's birth. Before Giovanna was born, Maegan agreed to place Giovanna up for adoption, believing a third child might be too much for her. With the assistance of an adoption agency, Maegan signed a Voluntary Placement Agreement, agreeing to temporarily place Giovanna "in the home of prospective

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

adoptive parents [Steven and Donna]" from the time "the child [is] release[d] from the hospital" until "the termination of parental rights hearing." Maegan told the adoption agency that she did not know the identity of Giovanna's father.

¶4 At the same time, Steven and Donna signed a Legal Risk Placement Agreement. The document warned Steven and Donna that although Giovanna would be placed in their home before termination of Maegan's parental rights, Giovanna could be returned to Maegan at any time if the court chose not to terminate the parents' parental rights or if Maegan changed her mind. By signing the document, Steven and Donna agreed "to promptly physically deliver the child to [the adoption agency]" if "the mother [Maegan] or the court demand removal of the child … before finalization of adoption."

¶5 Steven and Donna took placement of Giovanna at her birth and returned to their home in Maryland. Maegan expressed reservations about the adoption while still at the hospital and asked for visitation.

¶6 After Giovanna was born, Noel was determined to be her father. Noel, who was incarcerated, did not want to voluntarily terminate his parental rights.

¶7 On November 16, 2010, petitions requesting termination of Maegan's parental rights (on a voluntary basis) and Noel's parental rights (on an involuntary basis) ("TPR petitions") were filed.[2] A jury trial on the petitions was held, and, at the conclusion of the trial, the jury found that there were no grounds

[2] The Honorable Christopher R. Foley presided over the termination of parental rights case.

on which to involuntarily terminate Noel's parental rights. Because of the jury's verdict regarding Noel, and Maegan's renewed desire to raise Giovanna, the trial court dismissed both the voluntary and involuntary TPR petitions on May 24, 2011.

¶8 Several days prior to the trial court's order dismissing the TPR petitions, Steven and Donna were informed that Maegan wanted Giovanna back. Despite the Legal Risk Placement Agreement, Steven and Donna did not immediately return Giovanna.

¶9 Meanwhile, a social worker with the Bureau of Milwaukee Child Welfare ("BMCW") made three home visits in June to investigate Maegan's home to ensure Maegan was prepared for Giovanna's return. The social worker found no safety concerns or parenting skill deficits, no abuse or neglect, and described Maegan as nurturing and interactive with her other children. Maegan requested services from BMCW's safety services program to enhance her parental capacities and to provide her with extra support.

¶10 On July 1, 2011, Steven and Donna filed a petition for temporary and permanent guardianship. Thereafter, on July 7, 2011, Giovanna's guardian *ad litem* ("GAL") from the dismissed TPR action filed a motion requesting that the trial court order Steven and Donna to return Giovanna to Maegan pursuant to the terms of the Legal Risk Placement Agreement. Giovanna was then eight months old. On July 19, 2011, the trial court denied the GAL's motion for return of the

child and granted Steven and Donna temporary guardianship, ending all TPR-related litigation.[3]

¶11 The trial on the permanent guardianship petition commenced on August 24, 2011, and concluded on September 20, 2011. During the trial, in a separate action, Giovanna's GAL filed a petition for protection or services ("CHIPS petition") pursuant to WIS. STAT. § 48.13(8), (10), and (10m), on the grounds that Giovanna, if left in Maegan's and Noel's care, would be in need of protection or services. Steven and Donna filed a motion to dismiss the petition, arguing that the court lacked jurisdiction to grant it because Giovanna was legally in their custody. The trial court decided to wait to rule upon the motion until the guardianship trial had concluded.

¶12 Meanwhile, at trial, the court limited the evidence to facts occurring after Giovanna's conception, excluded a recording of a prison phone conversation between Maegan and Noel as privileged and a discovery violation, and excluded a copy of the GAL's CHIPS petition. At the conclusion of the trial, the trial court dismissed the permanent guardianship petition, finding that: (1) Steven and Donna failed to show that either Maegan or Noel was unfit under ***Barstad***; and (2) due process does not require or permit the court to consider the rights and interest of the child over those of the birth parents in a guardianship custody decision. At the same time, the trial court dismissed Steven and Donna's motion to dismiss the GAL's CHIPS petition. Steven and Donna appeal.

[3] Judge Foley, as the judge who presided over the TPR petition, ruled on the petition for temporary guardianship and denied the GAL's motion to return Giovanna to Maegan. However, the Honorable Marshall B. Murray was assigned to the guardianship case and presided over the petition for permanent guardianship.

DISCUSSION

I. The trial court did not deny Giovanna her right to due process.

¶13 Steven and Donna argue that the trial court violated Giovanna's due process rights when it: (1) failed to consider her best interests; and (2) determined the outcome of the petition before hearing all of the evidence.[4] We conclude, for the reasons stated below, that the best interests of the child is not the prevailing standard at a guardianship hearing under WIS. STAT. ch. 54, and that Steven and Donna's argument that the trial court predetermined their petition is undeveloped.

¶14 Steven and Donna brought this third-party guardianship action under WIS. STAT. ch. 54. WISCONSIN STAT. § 54.10(1)[5] permits the trial court to appoint a guardian for a minor but does not set forth the process or standard to determine when appointment is appropriate. The trial court here relied on the standard for custody transfers to third parties articulated in ***Barstad***, that "a parent is entitled to custody of his or her children unless the parent is either unfit or unable to care for the children or there are compelling reasons for awarding custody to a third party." ***Id.***, 118 Wis. 2d at 568. The ***Barstad*** court expressly stated "that 'the best

[4] The GAL argues that Steven and Donna, as non-parent petitioners, do not have standing to assert Giovanna's due process rights. However, because we must otherwise address the proper standard to be applied in third-party guardianship actions under WIS. STAT. ch. 54, to wit, the issue upon which Steven and Donna's due process argument lies, and because we conclude that Steven and Donna's due process argument is without merit, we do not address whether Steven and Donna have standing. *See* ***Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n, Inc.***, 2011 WI 36, ¶40 n.18, 333 Wis. 2d 402, 797 N.W.2d 789 ("Wisconsin courts evaluate standing as a matter of judicial policy rather than as a jurisdictional prerequisite."); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible grounds).

[5] WISCONSIN STAT. § 54.10(1) states: "A court may appoint a guardian of the person or a guardian of the estate, or both, for an individual if the court determines that the individual is a minor."

interests of the child' is not the proper standard in custody disputes between a natural parent and a third party." ***Id.*** at 554-55.

¶15 Steven and Donna agree that ***Barstad*** does not permit the court to elevate the best interests of the child over a parent's right to custody in third-party guardianship matters. They also acknowledge that we have recently applied the standard articulated in ***Barstad*** to a WIS. STAT. ch. 54 guardianship case. *See* ***Cynthia H. v. Joshua O.***, 2009 WI App 176, ¶41, 322 Wis. 2d 615, 777 N.W.2d 664 (holding that ***Barstad*** continues to articulate the standard to be applied in third-party guardianship actions after the legislature's decision to enact WIS. STAT. ch. 54).[6] Despite these concessions, Steven and Donna still argue that we should modify the ***Barstad*** standard to permit courts to consider the best interests of the child. However, it is well settled that the court of appeals may not "overrule, modify or withdraw language from a previous supreme court case." ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶16 Our case law is clear that the best interests of the child should not be considered absent a finding that a parent is either unfit or unable to care for his or her child. *See* ***Barstad***, 118 Wis. 2d at 568-69. In rejecting the best-interest-of-the-child standard in ***Barstad***, in which a grandparent petitioned for custody of her grandson, ***id.*** at 551, our supreme court explained that "[w]hen a parent is young, the physical, financial and even emotional factors may often appear to favor the grandparents. One cannot expect young parents to compete on an equal level with

[6] Prior to the enactment of WIS. STAT. ch. 54 in December 2006, to wit, at the time ***Barstad v. Frazier***, 118 Wis. 2d 549, 348 N.W.2d 479 (1989), was decided, guardianship law was located in WIS. STAT. ch. 880. *See* ***Cynthia H. v. Joshua O.***, 2009 WI App 176, ¶41, 322 Wis. 2d 615, 777 N.W.2d 664.

their established older relatives," ***id.*** at 556. The court pointed out that, if the best-interest standard were the test, "we would be forced to conclude that only the more affluent in our society should raise children. To state the proposition is to demonstrate its absurdity." ***Id.*** That same reasoning applies here, where the third party is not a grandparent, but a prospective adoptive parent.

¶17 We also address Steven and Donna's argument that the best-interest-of-the-child standard should be part of the ***Barstad*** analysis because of the clear expression of legislative intent in WIS. STAT. § 48.01 that the child's best interests be paramount in all WIS. STAT. ch. 48 actions. In short, this is not a ch. 48 action. But to the extent that a third-party guardianship action shares features of a CHIPS-related guardianship action, we note that the legislative expression of purpose in WIS. STAT. § 48.01(1) includes the preservation of the unity of the family along with the best interests of a child. As noted above, the Wisconsin Supreme Court explained in ***Barstad*** why the best interests of the child could not be the standard in a third-party transfer of custody away from natural parents. Those reasons apply here.

¶18 Finally, Steven and Donna argue that the trial court violated Giovanna's due process rights by "deciding that [it] was going to return the child to the mother at the first hearing." As evidence that the court's mind was made up prior to hearing all of the facts, Steven and Donna point to the trial court's comments "encour[aging]" Maegan to withdraw her substitution of judge motion and the trial court's decision to deny Steven and Donna's motion to dismiss the CHIPS action. Not only is this argument pure speculation, Steven and Donna do not cite to any legal authority in support of their accusations. Their argument is completely undeveloped. We will not consider unsupported arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

II. The trial court properly exercised its discretion when it found that Maegan was fit and able to parent, and that there were no other compelling circumstances to deny her custody of Giovanna.

¶19 Next, Steven and Donna argue that the trial court erred in concluding that Maegan was fit and able to raise Giovanna, and that there were no other compelling circumstances on which to deny her custody. We cannot disturb the trial court's custody award unless the "findings of fact upon which the custody determination is based are clearly erroneous" or unless the custody determination represents an erroneous exercise of discretion. ***Cynthia H.***, 322 Wis. 2d 615, ¶33; *see also* ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375 (acknowledging that the supreme court has "replaced the phrase 'abuse of discretion' with the phrase 'erroneous exercise of discretion'"). Steven and Donna do not challenge the trial court's factual findings, but rather ask us to conclude that the trial court's decision was an erroneous exercise of discretion.

¶20 We uphold a trial court's discretionary decisions if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a reasonable conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). "'[B]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain its discretionary determinations.'" ***Allstate Ins. Co. v. Konicki***, 186 Wis. 2d 140, 149, 519 N.W.2d 723 (Ct. App. 1994) (citation omitted). A trial court properly exercising "'its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.'" ***State v. Eichman***, 155 Wis. 2d 552, 568, 456 N.W.2d 143

(1990) (citation omitted). Applying those standards to the trial court's finding that Maegan is a fit and able parent, we must uphold the court's decision as reasonable.

¶21 The trial court made detailed written findings of fact supporting Maegan's fitness to parent, including the following: shortly after placing Giovanna for adoption with Steven and Donna, Maegan changed her mind and requested that Giovanna be returned to her custody; she has maintained her therapy since January 2010; she has maintained a home for the past few months; she has a support system in place consisting of her mother, aunt, and sister; she has complied with the BMCW social workers and safety services; she wants to take advantage of the services offered by the BMCW; BMCW has determined that she is not a safety risk to any of her children; she has the protective capacity to protect her children from abuse and neglect; and she has never had the opportunity to care for Giovanna.

¶22 Steven and Donna correctly argue that the trial court also made findings that weigh against a conclusion that Maegan is a fit and able parent, such as: she has used profane language in front of and towards her sons; she has consumed marijuana and alcohol while taking psychotropic medications for depression and other mental health issues; she posted a video on YouTube of a street fight that she and others engaged in, showing a propensity to violent behavior; she has called the police as a result of someone coming to her home with a gun; she has requested family members care for her children while she goes out for an evening with the girls; she has lived at six or seven different addresses since January 2010 and the most recent address only since July 2011; she has associated with men who have criminal records and are incarcerated; she has been arrested for and pled guilty to disorderly conduct, was sentenced to eighteen months of probation, was revoked, and has spent time in jail; she has received several

municipal citations; she has missed court dates; and she has missed appointments with her therapist.

¶23 Steven and Donna argue that the trial court acknowledged that Maegan was unfit when it stated in its written order that it was "keenly aware of the fact that some one [sic] looking at the negative factors relating to the mother, … could come to the conclusion that these factors add up to 'unfitness[.]'" From that statement, Steven and Donna argue that the only reasonable conclusion based upon the trial court's factual findings is that Maegan is unfit.

¶24 We disagree. The trial court's fitness finding was the product of its proper exercise of discretion. Applying the ***Barstad*** test to the undisputed facts, and noting that it was Steven and Donna's burden to show unfitness by clear and convincing evidence, *see* ***Robin K. v. Lamanda M.***, 2006 WI 68, ¶17, 291 Wis. 2d 333, 718 N.W.2d 38 ("In proceedings for the appointment of a guardian, the burden of proof by clear and convincing evidence rests upon the party seeking guardianship."), the trial court concluded they failed to meet that burden. The trial court's conclusion was reasonable and carefully explained.

¶25 Steven and Donna essentially argue that the trial court improperly weighed the facts. For example, they cite to Maegan's marijuana usage, her involvement in a street fight, her profanity, and her association with individuals with a criminal record, as outweighing any of the factors which support a finding that she is a fit and able parent. However, the trial court weighed the factors differently and explained its reasoning in a detailed order.

¶26 The trial court acknowledged that Maegan smoked marijuana several times a week while on medication, and that she apparently believed that use of marijuana, alcohol, and profanity were acceptable. Nonetheless, the court noted

that Steven and Donna had produced no evidence demonstrating that Maegan had ever done anything unsafe or harmed her children while high or that Maegan's beliefs harmed her children. Furthermore, the trial court noted that, while it found the YouTube video of Maegan in a street fight "at best disgusting," her children were not present during the fight. The trial court also faulted Maegan for associating with an individual who would brandish a gun in her home, but noted that she handled the situation correctly by calling the police.

¶27 In sum, the trial court stated it believed that despite those factors tipping the scale against a fitness finding, the totality of the circumstances did not add up to unfitness. The court noted that Maegan had not abandoned the children, persistently neglected her parental duties, or otherwise negatively affected the welfare of her children. The court weighed more heavily Maegan's positive decisions, such as: seeking child care assistance, asking for help from BMCW, and recognizing her own limitations and how assistance from BMCW could increase her parenting capacity. The court found these positive factors to outweigh the negative. Applying different weight to properly considered factors than Steven and Donna or another judge, does not render the trial court's discretionary decision improper. *See* ***Eichman***, 155 Wis. 2d at 568 ("[A] trial court in the exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.").

¶28 The trial court noted Maegan's constitutional right to parent her child, her absence of any opportunity to do so, and the availability of services for Maegan to help her overcome some of her negatives. The court did consider any potential risk to Giovanna from being returned to Maegan, but found that any risk

would be mitigated by the child's natural resilience, BMCW's involvement, and Maegan's strong desire to parent Giovanna. Thus, the court found that any risk did not rise to a level justifying removal. As such, the trial court used a demonstrated rational process to reach a reasonable conclusion that a reasonable judge could reach, and we affirm. *See* ***Loy***, 107 Wis. 2d at 414-15.

III. The trial court properly exercised its discretion when it found that Noel was fit and able to parent, and that there were no other compelling reasons to deny him custody of Giovanna.

¶29 Next, Steven and Donna argue that the trial court erroneously exercised its discretion by finding that Noel was fit and able to parent. Again, we conclude there was no such erroneous exercise of discretion.

¶30 The trial court made the following findings regarding Noel's fitness and ability to parent: he has been convicted of three misdemeanors and two felonies; he is currently serving a prison sentence for at least two felonies; he will not be released from prison until 2015; he supports Maegan having custody of Giovanna; he has the support of his mother, who has offered to help Maegan care for Giovanna; and he has never had the opportunity to care for Giovanna. In addition to the above written findings of the court, Noel's testimony at trial is evidence that he voluntarily acknowledged his paternity, intends to place Giovanna on his visitation list, and intends to support her from his correction wages.

¶31 The trial court concluded that Steven and Donna had failed to show by clear, satisfactory, and convincing evidence that Noel was unfit or unable to parent Giovanna or that other compelling circumstances existed to meet their burden. The court found that incarceration alone was not a compelling

circumstance, that Noel wants the opportunity to parent Giovanna, and that he would sign consent forms to permit her to receive any necessary services.

¶32 Steven and Donna argue that the trial court's finding that Noel's incarceration was not a compelling circumstance warranting custody transfer is clearly erroneous. However, they confuse the standard of review for factual findings with the standard for the court's legal conclusion. *See* ***Cynthia H.***, 322 Wis. 2d 615, ¶33 ("A custody award will be upset only if the appellate court is convinced [1] that the findings of fact upon which the custody determination is based are clearly erroneous, or [2] that the custody determination represents [an erroneous exercise of discretion].)" (internal citations omitted). Whether Noel's incarceration is sufficient to show that he is unfit or unable to parent, or presents other compelling circumstances demonstrating unfitness, is a question for the court's discretion. *See* ***id.*** Significantly, Steven and Donna cite no law supporting a legal conclusion that incarceration alone constitutes a compelling circumstance justifying a custody transfer, nor could they. Our case law clearly states that a parent's incarceration does not in itself demonstrate that he or she is unfit. ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶49, 293 Wis. 2d 530, 716 N.W.2d 845. As such, the trial court properly concluded that Noel's incarceration alone did not support Steven and Donna's burden.

¶33 The trial court addressed both the positive and negative evidence regarding Noel's fitness as a parent, and after applying the correct law, reached a reasoned and supported decision. Giving the trial court's discretionary decision "great weight on appeal" in recognition of the court's first-hand observation and experience with the persons involved, we affirm. *See* ***Barstad***, 118 Wis. 2d at 554.

IV. The trial court properly exercised its discretion in its evidentiary rulings at trial.

¶34 Steven and Donna also argue that the trial court erred by: (1) limiting the evidence admitted at trial to those events occurring after Giovanna was conceived; (2) excluding recordings of phone calls between Maegan and Noel while Noel was incarcerated; and (3) excluding a copy of the CHIPS petition filed by the GAL. A trial court has broad discretion when making evidentiary determinations, and our review is highly deferential. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. A court properly exercises its discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational and legally sound conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). Keeping that standard in mind, we address each of Steven and Donna's evidentiary concerns in turn.

A. Limiting the Evidence to Events Occuring After Giovanna's Conception.

¶35 Steven and Donna challenge the trial court's evidentiary decision limiting the evidence to events that occurred after Giovanna's conception. Steven and Donna contend that they should have been allowed to present evidence of Maegan's parenting of her two older children prior to Giovanna's conception because "the behavior she may have engaged in while being responsible for them" is relevant to her fitness to parent Giovanna. They complain that the GAL was permitted to argue that Maegan had managed to raise the other two children despite her mental health issues, while they were unfairly prohibited from rebutting the GAL's argument. However, Steven and Donna fail to describe *what* evidence they would have introduced and *how* that evidence would have been relevant to Maegan's fitness to parent Giovanna. We will not consider undeveloped, unsupported arguments. ***Pettit***, 171 Wis. 2d at 646-47.

B. Recording of Prison Telephone Conversations.

¶36 Steven and Donna also challenge the trial court's decision to prohibit the admission at trial of phone calls between Maegan and Noel while Noel was incarcerated. The court stated two grounds for its decision: (1) privilege; and (2) discovery violation.

¶37 At the time of Steven's pretrial deposition on August 10, 2011, Steven testified that his counsel had obtained a set of recorded telephone calls between Noel, who was in prison, and Maegan. Steven's attorney stated that she intended to use the content of those phone calls at trial. Both Maegan's and Noel's attorneys requested copies of the phone calls and indicated that they were willing to pay the reasonable cost of reproducing them. Steven's attorney stated that she would provide copies of those recordings to the GAL, and to both Maegan's and Noel's attorneys.

¶38 At the final pretrial on August 19, 2011, Maegan's attorney told the trial court that he had not yet received the copies of the recordings and that if he did not get them, he would seek an order to exclude them at trial. On the day of trial, August 24, 2011, neither Maegan's nor Noel's attorneys had received the recordings. Both filed motions *in limine* asking the court to exclude them. The trial court heard argument on the motions *in limine* and took telephonic testimony, at the GAL's suggestion, from the Department of Corrections ("DOC") chief legal counsel about WIS. ADMIN. CODE § DOC 309.39(6), the rule relating to release of the transcripts.

¶39 DOC counsel testified that the recordings were released in error by a DOC employee while counsel was on vacation. She said that the DOC's interpretation of WIS. ADMIN. CODE § DOC 309.39(6) was that the DOC would

not release the recordings to an attorney in the absence of a court order compelling it to do so. She explained that the DOC recognized that there was a rehabilitative importance in communications between inmates and the outside world. She also acknowledged that the inmates are told that the telephone calls are recorded for security reasons but that they are not released for non-criminal, non-security reasons.

¶40 Steven and Donna argue that: (1) the phone calls were not privileged because both Noel and Maegan had been warned that the phone calls were being recorded; (2) that the phone calls were relevant because they revealed Maegan's use of alcohol, violent tendencies, and use of profanity toward her two other children; and (3) in an undeveloped argument, that Noel and Maegan had no expectation of privacy. Steven and Donna provided an affidavit from their investigator summarizing the content of the phone calls, and neither Maegan nor Noel contest the summary.

¶41 The trial court excluded the phone calls, in part, because they were privileged and released in error, citing testimony from the DOC's counsel. The court reasoned that these calls were about private matters between Maegan and Noel and not criminal activity or a security concern. Therefore, Noel and Maegan had a reasonable expectation of privacy based on WIS. ADMIN. CODE § DOC 309.39(6). The court also faulted Steven and Donna for failing to turn over the recordings or transcripts within a reasonable time before trial, despite discovery demands by Maegan and Noel.

¶42 Steven and Donna sought to use the recordings to show that Maegan abused alcohol, was violent, and directed profanities at her children. Steven and Donna do not contest the trial court's findings concerning the meaning and

purpose of WIS. ADMIN. CODE § DOC 309.39(6), but rather argue that Noel, as a prisoner forfeited his right to privacy, and Maegan, upon hearing the recorded message at the beginning of her phone call informing her that the call would be recorded, waived her right to privacy. Given the DOC's counsel's testimony, that the release of the recordings was a violation of the DOC's interpretation of § DOC 309.39(6), we conclude that the trial court gave a reasoned explanation for why it would not allow the recordings used against Maegan. She was not a prisoner, and the conversations had nothing to do with crimes or security.

¶43 Additionally, we conclude that the trial court was within its discretion to prohibit admission of the recordings based on Steven and Donna's failure to turn over the recordings during discovery. Furthermore, Steven and Donna do not suggest that the recordings presented new evidence. The trial court had already heard of Maegan's violent behavior, alcohol use and profanity around the older children. Therefore, admission of the recordings would have been cumulative.

C. Use of the CHIPS Petition as Evidence.

¶44 Steven and Donna argue, without any supporting authority, that the trial court erred in refusing to accept the CHIPS petition as an exhibit and to take judicial notice of the filing of the CHIPS petition. They contend that the unproven CHIPS petition supported their argument that Maegan was unfit and unable to parent Giovanna. First, a petition contains only allegations which have yet to be proven. Second, their argument is undeveloped and unsupported. We will not consider undeveloped arguments. *See* ***Pettit***, 171 Wis. 2d at 646-47.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.