COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2354 **Cir. Ct. No. 2007TP17**

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

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

MELISSA S.,

PETITIONER-RESPONDENT,

V.

EDWARD T. K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] Edward T.K. appeals from an order terminating his parental rights (TPR) to Clayton J.K. following a jury trial on a TPR petition filed by Clayton's mother, Melissa S. Edward argues that the trial court lost competency to exercise its jurisdiction under Wisconsin's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) because an Iowa court previously entered a custody order for Clayton and did not decline jurisdiction until seven months after this action was filed. Alternatively, Edward argues that the trial court erroneously exercised its discretion in admitting into evidence an audio recording of his interaction with Clayton, which Edward claims was irrelevant and highly prejudicial. We conclude that the trial court complied with the UCCJEA and properly exercised its discretion to admit the recording. Accordingly, we affirm.

Background

¶2 The following undisputed facts are taken from the TPR proceedings.[2] Clayton was born to Melissa and Edward in Iowa in 1998. The following year, Melissa and Edward's relationship ended.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Edward provided a statement of the case in his brief-in-chief, pursuant to WIS. STAT. § 809.19(1)(d). Melissa also provided a statement of the case in her response brief, as allowed by WIS. STAT. § 809.19(3)(a)(2). Edward then filed a motion to strike Melissa's brief under WIS. STAT. §§ 809.14 and 809.83(2) for failing to provide "appropriate references to the record" as required under § 809.19(1)(d). Edward argues that Melissa's statement of facts cited to matters outside the record, mischaracterized trial testimony, and contained inappropriate argument. Specifically, Edward points to the following in Melissa's brief: a statement that Melissa informed the trial court off the record about the Iowa proceedings; details about Edward's conviction and the parties' past exercise of placement that lack citation to the record or that are not fully supported by the cited testimony; descriptions of testimony that Edward had a "violent temper," the custody proceedings were "acrimonious," that Clayton "feared" Edward, and details of the child support proceedings which Edward contends belong in argument rather than a factual section; and facts from the dispositional phase, which Edward contends are totally irrelevant to the issues here, regarding the grounds phase.

(continued)

¶3 In 2001, the Iowa District Court for Dubuque County entered a custody order for Clayton, with joint custody but primary placement with Melissa. In August 2004, Melissa and Clayton relocated to Wisconsin, and Edward

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Melissa responds that her statement of the case was optional under WIS. STAT. § 809.19(3)(a)2., and that all of Edward's complaints about her brief focus on the statement of the case rather than her argument. Melissa concedes that some of the facts in her statement of the case lack adequate citations to the record and that she improperly cited to an off the record remark. She requests that we disregard her statement of the case as a remedy for her failure to properly cite to the record.

As we stated in our order denying Edward's motion, we decline to strike Melissa's brief. We agree with Melissa that the proper remedy in this case is to disregard her statement of the case rather than to strike her brief. While we sympathize with Edward's counsel's frustration with Melissa's counsel's citation to facts not in the record and other non-compliance with the rules, we do not agree that striking Melissa's brief is appropriate. First, this is a TPR case under Wisconsin's Children's Code, and we recognize that Clayton's interests are of paramount consideration. *See* WIS. STAT. § 48.01(1). Striking Melissa's brief for failure to properly cite facts or for improperly including arguments and facts outside the record in her optional statement of the case, particularly when none of those points bear on the arguments she raises, does not serve Clayton's best interest. Rather, the appropriate remedy is for us to disregard Melissa's optional statement of the case and proceed to the merits of this case so that, in accord with the purpose of the Children's Code, Edward's parental rights to Clayton can be resolved as quickly as possible. *See generally* § 48.01. Accordingly, we do not consider Melissa's statement of the case. *See, e.g.*, ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) (we "need not sift the record for facts to support counsel's contentions" and "[a]ssertions of fact that are not part of the record will not be considered").

Finally, in our order denying Edward's motion, we stated that Edward filed his motion to strike two days after the deadline for his reply brief was due. Edward's counsel then wrote us a letter stating that while under WIS. STAT. §§ 809.107(6)(c) and 801.15(1)(b) the reply brief was due on November 30, 2009, and counsel filed the motion to strike on December 2, 2009, Edward was entitled to three extra days to submit the reply brief under WIS. STAT. § 801.15(5)(a) because the response brief was served on counsel by mail. The problem we have in assessing this argument is that our clerk's office calculates reply brief due dates according to §§ 809.107(6)(c) and 801.15(1)(b), and enters those dates in an electronic system; the policy of the clerk's office is to change those dates to allow appellants three extra days according to § 801.15(5)(a) if the appellant notifies the clerk's office that he or she received the respondent's brief by mail. No rule requires this notice. Once the reply brief is filed, the clerk's office does not retain documentation of reply brief due dates. We have no documentation in the record as to whether respondent's brief was, in fact, served on counsel by mail. We will accept for purposes of this action counsel's assertion that she received respondent's brief by mail, and we will further assume that she notified the clerk's office of that fact. Thus, we retract our statement that Edward's motion to strike was filed two days after the deadline for his reply brief.

continued to exercise his placement rights with Clayton.[3] In November 2005, the Iowa court entered a revised placement order. Edward continued to exercise placement until February 2006, when he and Melissa agreed to suspend placement pending resolution of Edward's legal problems. Edward and Melissa spoke several times after Edward's last visit with Clayton, and Edward left several telephone messages for Melissa throughout the remainder of 2006. However, Edward did not call or write to Melissa or Clayton after December 22, 2006, through June 27, 2007. During most of this time, Edward was incarcerated.

¶4 On June 27, 2007, Melissa filed this action to terminate Edward's parental rights to their son, Clayton. She alleged both abandonment and failure to assume parental responsibility. *See* WIS. STAT. §§ 48.415(1)(a)3. and (6). She included a UCCJEA affidavit, stating that an Iowa court previously held proceedings concerning the custody, placement or visitation of Clayton. *See* WIS. STAT. § 822.29. However, the court did not address whether the Iowa custody order implicated its competency to exercise its jurisdiction at that time, and proceeded toward trial on Melissa's petition.

¶5 In a pre-trial motion, Edward moved the court to exclude a recording of his interaction with Clayton, which revealed Edward berating Clayton for over an hour to recite the ABCs. Edward argued that the recording was irrelevant and highly prejudicial. Melissa argued the recording was relevant as rebuttal to deposition testimony that Edward and Clayton had a good relationship, and as to Edward's defense that he had good cause for failing to contact Clayton for six

[3] There was some dispute at trial as to how and when Edward exercised placement, but both parties agreed Edward continued to exercise his right to placement during this time period.

months when Melissa refused to take his calls, because it showed why Melissa did not answer Edward's phone calls. The court found

> that it is probative here, makes something more or less likely as to the just cause issue because while that is the burden of the respondent, it again is something that the petitioner may have to anticipate either in their case in chief or by way of rebuttal to, depending on the timing, when did these things happen, as a part of the basis for any explanation she may have to counter the evidence concerning just cause. So it's relevant to that extent in the Court's view. And it is prejudicial but not unfairly so….
>
> … [I]t is probative of the petitioner's explanation for, perhaps for not communicating, for not taking initiatives to permit communication, for not returning phone calls, for not letting … the respondent know precisely where she was, by way of explanation for her conduct.
>
> Here again, I haven't heard the case, and I haven't seen how this is going to play out. For my purposes, I'd rather, if this comes in at all, I'd rather it is in rebuttal ….

¶6 Edward then moved the court to reconsider its decision. Melissa again argued that the recording was relevant "to show Melissa's reasons for not returning phone calls beginning in April '06." The court denied Edward's motion, stating

> that it depends on the nature of the proof concerning good cause, which is the respondent's burden to produce and to show. And while I can't totally control the order of proof here, the court, one, wants to know when in this trial this particular CD is going to be introduced; and I want to know in advance of its introduction; and whoever uses it is under my direction to alert the court when that's going to happen. We'll take a break and I will assess the situation at that point in time.

¶7 Also prior to trial, and seven months after this action was filed, Melissa moved the Iowa court to determine that Iowa was an inconvenient forum and to decline jurisdiction so that the circuit court could proceed. Edward then

moved the circuit court for a continuance of the scheduled jury trial until Iowa ruled on Melissa's motion, or to dismiss this case based on the court's lack of competency to exercise its jurisdiction under the UCCJEA. The circuit court denied Edward's motion to dismiss this case, but stayed the proceeding pending a decision by the Iowa court.

¶8 On March 4, 2008, the Iowa court entered an order declining jurisdiction in favor of Wisconsin. On March 7, 2008, Edward moved for reconsideration of his motion to dismiss for lack of competency to exercise jurisdiction. The court denied the motion.

¶9 The court held a jury trial on Melissa's petition to terminate Edward's parental rights in November 2008. Edward defended against both grounds alleged in the petition. He defended against the failure to assume parental responsibility ground by testifying as to his relationship with Clayton, and presented a good cause defense to the abandonment grounds by testifying that he did not call Melissa while he was in prison because Melissa had consistently refused to return his phone calls even before he was incarcerated, and he did not write to Clayton because he did not want to hurt him with the knowledge that his father was in prison. The court allowed Melissa to play the ABC recording in rebuttal over renewed objection by Edward.

¶10 The jury determined that there were grounds to terminate Edward's parental rights because he had abandoned Clayton for a period of at least six months without good cause. Edward moved for a new trial based on the court's admitting the ABCs tape, and the court denied the motion. Following a dispositional hearing, the court terminated Edward's parental rights to Clayton. Edward appeals.

Standard of Review

¶11 "Whether a circuit court has lost competency is a question of law that we review independently." ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶7, 273 Wis. 2d 76, 681 N.W.2d 190. We review a trial court's evidentiary rulings for whether the court properly exercised its discretion; that is, whether the court relied on the facts in the record and the applicable law to reach a reasonable conclusion. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

Discussion

¶12 Edward argues first that the circuit court lacked competency to exercise its jurisdiction in this case under the UCCJEA, adopted in WIS. STAT. ch. 822. Edward argues that a circuit court must have competency to exercise its jurisdiction under the UCCJEA at the time a TPR petition is filed, and that when Melissa filed the TPR petition in this case the Wisconsin courts did not have competency because the Iowa courts had not yet declined jurisdiction. We disagree.

¶13 At the outset, we note that "we are not reviewing whether the circuit court in this case had subject matter jurisdiction to decide the custody of [Clayton]." *See* ***P.C. v. C.C.***, 161 Wis. 2d 277, 298, 468 N.W.2d 190 (1991). "Subject matter jurisdiction is the power of the court to hear and decide a particular case or controversy," and "the circuit courts of Wisconsin are constitutional courts … of plenary jurisdiction" which are never "without subject matter jurisdiction to entertain actions of any nature whatsoever." ***Id.*** at 297-98 (citations omitted). Thus, "Article VII, sec. 8, of the Wisconsin Constitution makes it clear that the court did possess [subject matter] jurisdiction over the

custody matter." ***Id.*** at 298. The issue, rather, is whether, under WIS. STAT. § 822.21, it was proper for the circuit court "to make an initial [child custody] determination." *Cf.* ***id.*** (citing similar language in previous version of statute to reach analogous decision).

¶14 The "initial child custody jurisdiction" statute of the UCCJEA, WIS. STAT. § 822.21, "concerns the child's contacts with the state in which the custody determination will be made." *See* ***P.C.***, 161 Wis. 2d at 298 (citing predecessor to § 822.21, which contained similar language). Under § 822.21(1)(a), a Wisconsin circuit court "has jurisdiction to make an initial determination" in a child custody action if, *inter alia*, Wisconsin "is the home state of the child on the date of the commencement of the proceeding." Because "[t]he jurisdictional requirements of the [UCCJEA] must be met only at the commencement of the proceedings in this state," we look to whether Wisconsin was a child's home state on the date a TPR petition was filed. *See* ***P.C.***, 161 Wis. 2d at 302. Here, it is undisputed that the circuit court met the "initial jurisdiction" requirement under § 822.21(1)(a) when the action was filed because Wisconsin was Clayton's home state on the date this action was filed. Edward argues, however, that the jurisdictional requirements of the UCCJEA were not met because when the petition was filed, Iowa had already issued a custody order for Clayton and had not yet conceded jurisdiction to Wisconsin, and thus Wisconsin was prohibited from modifying the Iowa custody order under WIS. STAT. § 822.23.

¶15 The problem with Edward's argument, however, is that he conflates the "initial child custody jurisdictional" requirements of the UCCJEA under WIS. STAT. § 822.21 with the question of a court's authority to modify the custody

order of another state under WIS. STAT. § 822.23.[4] But these are separate steps: "After the custody petition is filed, a court which has properly assumed jurisdiction under the [UCCJEA] may nevertheless be required under the [UCCJEA] to decline to exercise that jurisdiction." ***P.C.***, 161 Wis. 2d at 307. Thus, even if "initial child custody jurisdiction" is met under WIS. STAT. § 822.21, a court "may not modify a child custody determination made by a court of another

[4] Melissa argues that the circuit court acted properly in modifying the custody order of another state under WIS. STAT. § 822.23, and in following the UCCJEA's guidelines for simultaneous proceedings under WIS. STAT. § 822.26, which provides:

> **(1)** … [A] court of this state may not exercise its jurisdiction under this subchapter if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum….
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> **(2)** … [A] court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties …. If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in conformity with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

Edward replies that WIS. STAT. § 822.26 is irrelevant because when this action was filed, a child custody proceeding had not been "commenced" in Iowa because that term contemplates that an action is still pending. Edward argues that when this action was filed, Iowa had already issued a custody order, and thus the court's competency is determined by WIS. STAT. § 822.23, "Jurisdiction to modify determination," rather than WIS. STAT. § 822.26, "Simultaneous proceedings." It is sufficient for purposes of this appeal to note that the circuit court stayed the proceeding in this case when it determined that there was a motion regarding this matter pending in Iowa, thus complying with WIS. STAT. § 822.26. Because we agree with Melissa that the court acted properly under either statute, we will accept for the sake of argument Edward's position that this case falls exclusively under WIS. STAT. § 822.23.

state unless [the court] has jurisdiction to make an initial custody determination" *and* "[t]he court of the other state determines that it no longer has exclusive, continuing jurisdiction under s. 822.22 or that a court of this state would be a more convenient forum," under WIS. STAT. § 822.23. However, contrary to Edward's argument, WIS. STAT. § 822.23 does not require a court to dismiss a custody action as soon as it discovers that another state had entered a custody order for the child when the action was commenced in this state. It prohibits the court from *modifying* the custody determination of another state unless the other court has declined jurisdiction.

¶16 Here, Wisconsin had "initial jurisdiction" over this case under WIS. STAT. § 822.21(1)(a) because Wisconsin is Clayton's home state. When the circuit court was notified that a motion was pending in Iowa as to whether Wisconsin was a more convenient forum to determine Clayton's custody, it stayed the proceeding.[5] Iowa then declined jurisdiction because it found that Wisconsin

[5] Edward also argues that questions of a court's jurisdiction or power to exercise its jurisdiction must be given priority under WIS. STAT. § 822.07, and that the circuit court was required to address the question of its competency at the time this action was commenced. He contends that the circuit court lost competency by not addressing the Iowa proceedings when this action was commenced, and did not cure that defect by addressing the Iowa proceedings seven months after this action was filed. Melissa argues that Edward "waived" the issue of the court's competency by not raising it until seven months after this proceeding was commenced. First, we reject Edward's argument that the circuit court lost competency by not addressing the issue at the time the action was commenced. Edward did not raise the court's competency until seven months into the proceeding, and the court addressed the issue promptly when it was raised; we cannot conclude that the court was required to address Edward's argument before he raised it. Moreover, WIS. STAT. § 822.23 states only that a court may not *modify* the custody order of another state until that state declines jurisdiction. More significantly, Edward has not identified any authority for the proposition that a court loses competency to proceed under the UCCJEA if it does not address its competency within a certain time frame of an action being filed, nor have we uncovered any. Next, because we conclude that the circuit court acted properly under the UCCJEA and did not lose competency to proceed, we decline to address Melissa's "waiver" argument, although we note that the issue is more properly cast as an issue of "forfeiture." *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("Whereas forfeiture is the (continued)

was a more convenient forum, and the Wisconsin circuit court held a trial on Melissa's petition to modify the Iowa custody order. *See* WIS. STAT. § 822.23(1). On these facts, we conclude that the court complied with the jurisdictional requirements of the UCCJEA.

¶17 Next, Edward argues that the trial court erred in admitting into evidence an audio recording of his interaction with Clayton, which revealed Edward repeatedly forcing Clayton to recite the ABCs, using profane and abusive language. Edward argues the recording was irrelevant to the grounds phase of the termination proceedings, and was highly prejudicial. *See* WIS. STAT. § 904.01 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); WIS. STAT. § 904.02 (only relevant evidence is admissible); WIS. STAT. § 904.03 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Edward argues that the circuit court erred by admitting the recording to allow Melissa to show good cause for refusing to return Edward's calls, because WIS. STAT. § 48.415(1) does not allow a *petitioner* to present a good cause defense to a respondent's good cause defense to an allegation of abandonment. Alternatively, he argues that even if the recording was relevant, its relevance was substantially outweighed by the danger of unfair prejudice because

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failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." (citation omitted)).

his abusive treatment toward Clayton on the recording was likely to inflame the jury.

¶18 Melissa responds that the recording was relevant to whether Edward had failed to assume parental responsibility for Clayton, which involved a determination of "whether [he] ha[d] expressed concern for or interest in the … well-being of [Clayton]." *See* WIS. STAT. § 48.415(6). She argues that the recording was also relevant to the abandonment grounds, because Edward presented a "good cause" defense for not having contacted Clayton for a six-month period. *See* WIS. STAT. § 48.415(1). Melissa contends that the recording of Edward berating Clayton made less likely his testimony that he did not contact Clayton while he was incarcerated out of a desire to protect Clayton from the knowledge that his father was in prison. She also contends that Edward opened the door for the recording by giving misleading testimony as to its contents. *See* ***Neely v. State***, 86 Wis. 2d 304, 313, 46 Wis. 2d 492 (Ct. App 1978).

¶19 We conclude that the trial court did not erroneously exercise its discretion in allowing the recording into evidence. Although we agree with Edward that the evidence was not relevant to Edward's good cause defense because the issue was not whether or not *Melissa* had good cause to prevent Edward from contacting Clayton, we conclude that the evidence was relevant rebuttal evidence because it called into doubt Edward's credibility after he testified that he did not contact Clayton for six months while he was incarcerated out of concern for Clayton's feelings; that he was actively involved in Clayton's education; and that he had a "frustrating moment" with Clayton in attempting to

teach him his ABCs.[6] *See* ***State v. Sandoval***, 2009 WI App 61, ¶¶32-33, 318 Wis. 2d 126, 767 N.W.2d 291 (evidence may be introduced in rebuttal if it directly answers an issue introduced by defendant); ***Stan's Lumber, Inc. v. Fleming***, 196 Wis. 2d 554, 573, 538 N.W.2d 849 (Ct. App. 1995) ("[W]e may independently review the record to determine whether additional reasons exist to support the court's exercise of discretion."). Edward testified about the ABCs event as follows:

> Q. Did there come a time, sometime in 2003, that you had a—you and Clayton—you had a problem with Clayton in his ABC's?
>
> A. I had a frustrating moment, yes.
>
> Q. Would that be [an] underestimate?
>
> A. By just a little.
>
> Q. What transpired between you and Clayton?
>
> A. It was—we were working on his ABC's. I knew he had—he knows his ABC's, and he works with them at school. We got into it. And he started saying them. And I don't know, he missed it a couple of times or whatever.
>
> And I don't know. I was frustrated. I got frustrated with the whole ordeal and blew it way out of proportion from what it should have been. And I mean, sometimes you have undue expectancy for your children. You want them to do the best and be the

[6] Edward argues in his reply brief that his testimony as to the content of the ABCs tape cannot be the basis for allowing the tape into evidence because the court had already ruled prior to trial that it would allow the tape. We reject this argument for two reasons. One, prior to trial, the court only denied Edward's motion to exclude the recording, and stated it would address admissibility at trial. Second, even if Edward only testified about the recording based on the trial court's ruling that it was admissible, the fact is that Edward's testimony provided a false depiction of the contents of the ABCs recording. Edward certainly had the option, at trial, of providing an accurate depiction of the contents of the tape, particularly if he believed the tape was going to be admitted into evidence.

> best. And sometimes you can push that too far. And that's pretty much what I did that day.
>
> Q. Would you agree you pushed it too far?
>
> A. Yes.
>
> Q. Did you want him to be able to complete the ABC's that day?
>
> A. Right. Yes. I knew that he knew that. And I don't know, like I say, it was a bad deal, put undue pressure on a child, you know, sometimes. And I don't know. You just have expectancy for him and things, and you want to be the best, and you want them to—you want them to succeed and, you know, be able to do things that, you know, they can do. I don't know. It was just a bad—it was a bad situation.

¶20 Edward introduced the issue of his concern for Edward as the crux of his defense to the abandonment grounds. Moreover, he directly testified about the ABCs event in a manner consistent with his defense: that he was a concerned, involved parent who did not want to upset his son with knowledge that his father was incarcerated. Thus, the recording was relevant because it made Edward's testimony less credible and therefore less likely to be true.

¶21 Finally, while we agree that the recording was prejudicial, we cannot say that the trial court erroneously exercised its discretion in admitting the evidence despite its prejudicial effect. Although the court might reasonably have excluded the evidence as unfairly prejudicial, its decision to allow the evidence despite its prejudicial effect had a basis in the record: the evidence was necessary to allow the jury to determine whether Edward had good cause for failing to contact Clayton out of concern for Clayton's feelings. *See* ***State v. Payano***, 2009 WI 86, ¶97, _Wis. 2d_, 768 N.W.2d 832 (upholding circuit court's decision to admit prejudicial evidence because "[i]t was *not* a decision that no reasonable

judge, acting on the same facts and underlying law, could reach" (citation omitted)). Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.