COURT OF APPEALS DECISION DATED AND FILED

October 27, 2011

A. John Voelker
Acting 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. 2010AP2737

Cir. Ct. No. 2010TP4

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE TERMINATION OF PARENTAL RIGHTS TO SAMANTHA L. C., A PERSON UNDER THE AGE OF 18:

KATHLEEN N. AND MARK N.,

PETITIONERS-RESPONDENTS,

V.

BRENDA L. C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: R.A. BATES, Judge. *Affirmed.*

¶1 SHERMAN, J.[1] Brenda L.C. appeals an order of the circuit court terminating her parental rights to Samantha L.C. on the grounds of abandonment and failure to assume parental responsibility. Brenda contends that a new fact-finding hearing is necessary in the interest of justice because irrelevant and prejudicial evidence was presented at the hearing which prevented the real controversy from being tried and, in the alternative, because she received ineffective assistance of counsel at the hearing. Brenda also contends that she is entitled to a new dispositional hearing because the circuit court considered the recommendation of a guardian ad litem (GAL) who was inappropriately appointed, and because of new evidence. This court affirms.

BACKGROUND

¶2 Samantha was born on January 11, 1999. She initially lived full-time with her cognitively disabled mother, Brenda, and father;[2] however, at Brenda's request, Samantha began living with Brenda's sister Kathleen N. and Kathleen's husband Mark N. shortly after Samantha's first birthday. Shortly thereafter, Kathleen and Mark were appointed Samantha's permanent guardians.

¶3 In January 2010, Kathleen and Mark petitioned to terminate Brenda's parental rights to then eleven-year-old Samantha on the grounds that Brenda had abandoned Samantha under WIS. STAT. § 48.415(1), and had failed to assume parental responsibilities under § 48.415(6).[3]

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The parental rights of Samantha's biological father are not at issue here.

[3] WISCONSIN STAT. § 48.415 provides in pertinent part as follows:

(continued)

¶4 Approximately one month after the termination petition was filed, the circuit court was notified by an attorney that her "client [Brenda] is very cognitively disabled," and that she had acted as a guardian ad litem (GAL) for Brenda in the past and was willing to serve as the GAL for Brenda in the termination proceeding. The court agreed that the attorney serving as Brenda's

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> **48.415 Grounds for involuntary termination of parental rights.** At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights…. Grounds for termination of parental rights shall be one of the following:
>
> **(1)** ABANDONMENT. (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:
>
> ….
>
> 3. The child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer.
>
> ….
>
> **(6)** FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

GAL in the termination proceeding "ma[de] sense" and eventually entered an order appointing the attorney as Brenda's GAL.[4]

¶5 A fact-finding hearing was held in June 2010 before a jury to determine whether grounds for termination had been established. The jury found that grounds existed to terminate Brenda's parental rights on the basis that she had abandoned Samantha and had failed to assume parental responsibility for her. At the subsequent dispositional hearing, the court found that termination of Brenda's parental rights was in Samantha's best interest and, in accordance with that finding, issued an order terminating those rights.

¶6 Thereafter, Brenda moved the circuit court to vacate its order terminating her parental rights on four bases. First, because evidence irrelevant to the question of whether the grounds for termination had been established was admitted at the fact-finding hearing, and clouded the crucial issues relating to whether grounds for termination had been established. Second, because her trial counsel was ineffective. Third, because the court appointed a GAL for Brenda without first making a finding of incompetence, and the GAL recommended that Brenda's parental rights be terminated, contrary to Brenda's express wishes. Fourth, because new evidence necessitated reconsideration of whether terminating Brenda's parental rights was in Samantha's best interest.

¶7 The circuit court denied Brenda's motion to vacate. Brenda appeals. Additional facts will be discussed below as necessary.

[4] The order appointing the GAL was entered on June 14, 2010.

DISCUSSION

¶8 Brenda contends that she is entitled to a new fact-finding hearing because the jury heard irrelevant and prejudicial testimony that "so clouded" the issue of whether grounds for termination had been established that the real controversy was not tried. Alternatively, she contends that she is entitled to a new fact-finding hearing because her attorney did not provide effective representation. Brenda also contends that she is entitled to a new dispositional hearing because the circuit court considered the recommendation of her improperly-appointed GAL, and improperly took notice of Samantha's adoption when the adoption should have been treated as a legal nullity. We address Brenda's contentions below.

A. Fact-Finding Hearing

1. Real Controversy

¶9 The proceeding to terminate an individual's parental rights is a two-step process. The first step is the fact-finding hearing, wherein the fact finder, be it the court or a jury, determines whether grounds exist for the termination of the individual's parental rights. ***Deannia D. v. Lamont D.***, 2005 WI App 264, ¶19, 288 Wis. 2d 485, 709 N.W.2d 879; WIS. STAT. § 48.424(1). At this stage, "'the parent's rights are paramount.'" ***Deannia D.***, 288 Wis. 2d 485, ¶19 (quoted source omitted). The petitioner must prove by clear and convincing evidence that at least one of the statutorily enumerated grounds for termination of parental rights exists. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856.

¶10 Brenda argues that she is entitled to a new fact-finding hearing in the interest of justice because evidence irrelevant to the question of whether grounds existed for termination was admitted at trial, which so clouded the crucial issue of

the hearing that it prevented the real controversy from being tried. Brenda argues that this evidence includes testimony by Kathleen regarding: Kathleen and her husband's employment and income; Brenda's employment and financial contributions for Samantha's care; Brenda's recent divorce; Brenda's ex-husband's child support delinquencies; Brenda and her ex-husband's financial difficulties; and Samantha's present well-being. Brenda also takes issue with her testimony that she was scared she would never see Samantha again if her parental rights were terminated, and her admission that Kathleen had told her that Kathleen wanted her to be part of Samantha's life.

¶11 At the fact-finding hearing, Kathleen testified:

> [Kathleen's attorney]: … are you employed?
>
> [Kathleen]: Yes.
>
> [Kathleen's attorney]: Where are you employed?
>
> [Kathleen]: I work at the Dane County Sheriff's Department.
>
> ….
>
> [Kathleen's attorney]: How long have you worked there?
>
> [Kathleen]: I have been there for a year.
>
> [Kathleen's attorney]: And did you work prior to your job at the Dane County Sheriff's Department?
>
> [Kathleen]: Yes. I had a day care in my home so that I could be home with the kids.
>
> [Kathleen's attorney]: And in your current job with the Dane County Sheriff's Department, how much do you make per year?
>
> [Kathleen]: About $40,000.
>
> [Kathleen's attorney]: And is your husband Mark, is he also employed?

[Kathleen]: Yes.

[Kathleen's attorney] And where does he work?

[Kathleen]: He works at Sussek Machine Corporation in Waterloo.

[Kathleen's attorney]: How long has he been employed there?

[Kathleen]: About six months.

Kathleen's attorney]: Did he have a job prior to his job at Sussek Machine?

[Kathleen]: Yes. He worked at Gilman Engineering for 29 years until they closed the doors.

[Kathleen's attorney]: And, if you know, how much per year or per hour or per day does your husband make?

[Kathleen} With his new job, he's making about 15 dollars an hour.

….

[Kathleen's attorney]: And do you have health insurance?

[Kathleen]: Yes.

[Kathleen's attorney]: … Is that through your employer?

[Kathleen]: Yes, it is.

[Kathleen's attorney]: Does that cover Samantha and [your other daughter] as well?

[Kathleen]: Yes.

….

[Kathleen's attorney]: And do you know if [Brenda] or her [ex-]husband Mark over the years were required to reimburse the state for [payments Kathleen and her husband received for undertaking the guardianship of Samantha]?

[Kathleen]: Yes. Mark [] had to…. [T]he judge said that, um, Mark [] had to make payments to the [S]tate but, because Brenda was on SSI and receiving that help …

> Brenda did not have to pay child support because she was receiving SSI.
>
> [Kathleen's attorney]: And for benefit of the jury, SSI, you would agree with me, is a government benefit because of the inability to be gainfully employed?
>
> [Kathleen]: She is able to be employed. She chooses not to be employed. She is getting extra help. But she is encouraged to go out and work. She just chooses not to.
>
> ….
>
> [Kathleen's attorney]: And … [do] you know if Mark [] was honoring his obligation to—to reimburse the [S]tate for the kinship care?
>
> [Kathleen]: No. From what I've heard, he's been out of work for a long time … and he is way behind in reimbursing the [S]tate.
>
> ….
>
> [Kathleen's attorney]: You talked a little bit about Brenda's work history. Talk to me a little bit about that.
>
> You said that she could have a job, she just chooses not to have a job. What do you mean by that?
>
> [Kathleen]: She's had many jobs in the past. She has a problem with authority and doesn't—I mean, she'll start a job. And, once she's told what to do or—she just refuses to be told what to do, and she'll go to work when she feels like it. When she doesn't, she just doesn't go.
>
> So she usually gets let go from every job that she does have. But she's capable of doing the work. She's just—she's not—I mean, she's getting hired for these positions because they feel that she's able to work. But she's just not choosing to continue the work.

¶12 In response to questions by her attorney regarding Brenda's financial contributions for shoes, clothing, school fees and other expenditures, Kathleen also testified:

> That we did not even ask them for, um, any money for anything is because they were way behind on their rent. They were way behind on paying their own bills. Their

> phone was being taken away, that sort of thing. So, no, we weren't going to ask for money because we knew that they didn't have it.

¶13 In addition, Kathleen testified that Samantha and Kathleen's other daughter are sisters, that Samantha does well in school and had been accepted into a gifted program, participated in church activities, played sports with friends, and eventually wants to be an art teacher.

¶14 Brenda argues that none of the above testimony was relevant to the sole questions at the fact-finding hearing, which were whether she had abandoned Samantha under WIS. STAT. § 48.415(1), or whether she had failed to assume parental responsibility for Samantha under § 48.415(6). Brenda claims that the evidence instead went to the question of whether termination of her parental rights was in Samantha's best interest, which is the focus of the later dispositional hearing, and "influenc[ed] the jury to answer the relevant questions in a way that is favorable to the petitioners," thus resulting in the real controversy not being fully tried. This court is not persuaded.

¶15 Pursuant to WIS. STAT. § 752.35, this court may reverse in the interest of justice when "it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." The real controversy has not been fully tried when the jury had before it "evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). The power to grant a new trial when it appears the real controversy has not been fully tried "is formidable, and should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. This court will exercise its

power of discretionary reversal only in exceptional cases. *See* ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543.

¶16 This court will assume for the sake of argument that the above testimony was not relevant to the issues at hand at the fact-finding hearing, and was thus inadmissible. Notwithstanding this assumption, this court is not persuaded upon our review of the record and the arguments of the parties that the irrelevant testimony so clouded the crucial issues at the fact-finding hearing that it can be said that the real controversy was not tried.

¶17 The jury was presented with testimony from both Kathleen and Brenda that established that Brenda had left Samantha in the exclusive care of Kathleen and Kathleen's husband since shortly after Samantha turned one. The testimony established that during that time, Kathleen and her husband had been Samantha's sole caregivers and together made all decisions relating to Samantha's health and wellbeing, without any contribution from or consultation with Brenda. According to Brenda, she "left that up to" Kathy and her husband. The testimony established that at all times, Brenda was aware of Samantha's whereabouts, but saw Samantha only at family functions where Samantha and Brenda usually spoke for only a few minutes. The evidence established that Brenda had last seen Samantha approximately six months prior to the hearing at a family gathering and had only spoken to Samantha at that event for a few minutes, Samantha's last communication with Samantha on Samantha's birthday back in January 2010.

¶18 The jury was given a complex special verdict form with eight separate questions it was required to answer in determining whether Brenda had abandoned Samantha and/or failed to assume parental responsibility for her. The court properly instructed the jury on how it was to answer those questions and

directed the jury to consider only evidence that was directly relevant to the grounds for termination. The jury is presumed to follow jury instructions. ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. Brenda has presented nothing in her argument that rebuts the presumption and nothing in the record leads this court to believe that the jury disregarded the court's instructions, or overlooked the evidence supporting its verdict to reach a decision based on the irrelevant testimony Brenda now takes issue with. This court does not conclude that the improperly admitted testimony so affected the outcome of the trial that it can be said that the real controversy was not tried.

2. Ineffective Assistance of Counsel

¶19 Brenda argues that she should be given a new fact-finding hearing because her attorney at that hearing provided ineffective assistance of counsel.

¶20 This court's review of an ineffective assistance of counsel claim presents mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). This court will uphold findings of fact unless they are clearly erroneous, but reviews independently the legal conclusion of whether the lawyer's performance was deficient and if so, prejudicial. ***Id.*** at 127-28.

¶21 To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697.

¶22 To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable

outcome. ***Id.*** at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶23 This court concludes that Brenda has failed to show that there is a reasonable probability that, but for counsel's alleged professional errors, the result of the proceeding would have been different.

¶24 Brenda asserts that her attorney was ineffective in that he failed to object to the best interest testimony above, elicited some of the best interest testimony himself, did not move to strike any irrelevant and prejudicial testimony, and did not request a jury instruction advising a jury to disregard Samantha's best interest in reaching its verdicts. However, as we concluded above, this court cannot say that any evidence relating to Samantha's best interests affected the outcome of the trial.

¶25 Brenda also asserts that her attorney was ineffective because he failed to depose Kathleen and Mark. She claims that if her attorney had deposed Kathleen, he would have learned that Brenda and Samantha saw each other five or six times a year at family gatherings, a fact which she claims is "highly relevant" to special verdict question number 3 on the issue of abandonment, which read: "Did Brenda [] fail to visit or communicate with Samantha for a period of 6 months or longer?" Brenda argues that a contested issue at the hearing was whether that communication was incidental, or insignificant and that had her attorney undertaken an investigation prior to trial, he would have known that "he

had a solid defense to the abandonment grounds, which was closely linked to the failure to assume grounds."

¶26 Even assuming that Brenda's last visit with Samantha was not incidental and that there is a reasonable probability that she could have successfully defended against the charge that she had abandoned Samantha, Brenda has not presented any reasons or legal authority that indicate that there is a reasonable probability that she could also have successfully defended against the failure to assume ground for termination. Brenda asserts that her defense to the abandonment ground "was closely linked to the failure to assume grounds." However, she does not develop this argument. Assertions that are not supported by reasons or legal authority will not be decided on appeal. ***State v. Pettit***, 171 Wis. 2d 627, 646-67, 492 N.W.2d 633 (Ct. App. 1992) (we will not decide issues that are inadequately briefed).

¶27 Accordingly, this court rejects Brenda's contention that she is entitled to a new fact-finding hearing because of ineffective assistance of counsel.

B. Dispositional Hearing

¶28 After grounds for termination have been established at the fact-finding hearing, the second step in a termination of parental rights proceeding is the disposition phase. At this stage of the proceeding, the circuit court must decide whether termination of a defendant's parental rights is in the best interests of the child. ***Door County DHFS v. Scott S.***, 230 Wis. 2d 460, 468, 602 N.W.2d 167 (Ct. App. 1999). During this step, the best interests of the child are paramount. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶23, 246 Wis. 2d 1, 629 N.W.2d 768.

¶29 The decision to terminate parental rights lies within the discretion of the circuit court. ***Jerry M. v. Dennis L.M.***, 198 Wis. 2d 10, 21, 542 N.W.2d 162 (Ct. App. 1995). This court will not overturn the circuit court's discretionary determination unless there has been an erroneous exercise of that discretion. ***Id.***

¶30 Brenda contends that she is entitled to a new dispositional hearing because the court, in deciding to terminate Samantha's parental rights, considered an improper factor—the recommendation by an inappropriately appointed GAL that her parental rights be terminated. Relying on WIS. STAT. § 48.235(1)(g), which states that a court "shall appoint a guardian ad litem for a parent who is the subject of a termination of parental rights proceeding" if an examination shows the parent to be incompetent, Brenda argues that her GAL was not properly appointed because the circuit court did not first conduct a competency determination. Brenda's reliance, however, is misplaced. Section 48.235(1)(a) grants the circuit court discretion in appointing a GAL "in any appropriate matter" under ch. 48. *See also,* Judicial Council Note, 1990, § 48.235 (stating subsection (1) "indicates when a guardian ad litem is to be appointed, leaving broad discretion to the court for such appointments.")

¶31 A court properly exercises its discretion if the record shows that the court exercised its discretion and a reasonable basis exists for its determination. ***Tralmer Sales & Serv., Inc. v. Erickson***, 186 Wis. 2d 549, 573, 521 N.W.2d 182 (Ct. App. 1994). Here, the circuit court was aware that Brenda is cognitively disabled. In exercising its discretion to appoint the GAL, the court noted that the appointment of the GAL would "serve as a great benefit to the Court." Regardless of whether Brenda was technically incompetent, her cognitive disability was a reasonable basis for the court to appoint a GAL under WIS. STAT. § 48.235(1)(a). Accordingly, this court holds that the circuit court did not erroneously exercise its

discretion in appointing the GAL and, thus, that the court's reliance on the GAL's recommendation was not an improper factor upon which to rely.

¶32 Brenda also contends that she is entitled to a new dispositional hearing because the circuit court, in terminating Brenda's parental rights, assumed that Brenda and Samantha would continue seeing one another. Brenda claims, however, that new evidence establishes that Kathleen had prevented Brenda and Samantha from seeing one another, which warrants reconsideration of whether terminating Brenda's parental rights was in Samantha's best interest. Brenda has not cited this court to any legal authority indicating that a new dispositional hearing must be ordered when what the court anticipates will occur following a termination proceeding does not come to fruition. The circuit court believed that because of the familial relationship between the parties involved, Brenda would still be able to see Samantha at times. However, there was no such requirement. Furthermore, the belief that Brenda and Samantha would continue to see one another occasionally was just one of many factors the court considered in reaching the decision and in the court's own words: "The visits were not the reason that [the court] terminated the parental rights of Brenda …. I hoped and wished that she would be able to. But that was not why I did it. I ran through the statutory factors."[5]

CONCLUSION

¶33 For the reasons discussed above, this court affirms.

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[5] Brenda also claims that the court improperly took judicial notice of a case regarding the adoption of Samantha. However, she does not articulate why this entitles her to a new dispositional hearing and this court will, therefore, not further address this claim. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Order affirmed.

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