COURT OF APPEALS DECISION DATED AND FILED

August 8, 2017

Diane M. Fremgen
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 Nos. 2016AP1501
2016AP1502
2017AP0720
2017AP0721

Cir. Ct. Nos. 2014TP058
2015TP324

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO D. W., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

K.J.

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO D. W., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

A.W.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

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

STATE OF WISCONSIN,

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K. J.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: MARK A. SANDERS and CHRISTOPHER R. FOLEY, Judges. *Affirmed*.

¶1 KESSLER, J.[1] K.J. and A.W. appeal the orders terminating their parental rights to their children, Diane and Andrew.[2] They also appeal the order denying their postdisposition motions.[3] We affirm.

BACKGROUND

¶2 This case has a complicated procedural background. Diane and Andrew are the biological children of K.J. and A.W. Diane was born on August 30, 2009. Andrew was born on October 11, 2013. Diane was removed from the care of K.J. and A.W. on May 20, 2011, when she was one years old. Diane was found to be a child in need of protection or services based upon allegations that K.J. and A.W. were physically abusing Diane's older sibling, and based upon allegations of drug dealing and usage in the home. The circuit court

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Because of the similarities between the children's initials and the parents' initials, we refer to the children using the aliases Diane and Andrew.

[3] The orders terminating the parents' parental rights to Diane are the primary orders on appeal; however, the parents also appeal the orders terminating their parental rights to Andrew pursuant to the doctrine of prejudicial spillover. In essence, they argue that a reversal of the orders terminating their parental rights to Diane necessitates a reversal of the orders terminating their parental rights to Andrew.

The Honorable Mark A. Sanders entered the orders terminating K.J. and A.W.'s parental rights to Diane. The Honorable Christopher R. Foley entered the orders terminating their parental rights to Andrew and denying their postdisposition motions.

issued a dispositional order which continued Diane's placement outside of the home.

¶3 On August 16, 2012, the State filed a petition to terminate both parents' parental rights to Diane on the grounds of Continuing CHIPS. On April 25, 2013, the circuit court found that the State failed to meet its burden of proof on the second element of Continuing CHIPS because the Division of Milwaukee Child Protective Services (DMCPS) failed to provide the requisite counseling services to K.J. and A.W. The circuit court did not immediately dismiss the TPR petition, however, because the State requested time to file extension and revision petitions as to the underlying CHIPS order. On May 7, 2013, the State filed a request to extend the CHIPS dispositional order. The circuit court held a hearing on the motion, granted the extension for thirty days, and dismissed the TPR petition. The CHIPS petition was ultimately revised and extended for one year.

¶4 On March 12, 2014, the State filed a second TPR petition as to Diane, seeking again to terminate the parental rights of both parents. The case proceeded to a court trial on May 18, 2015. At the conclusion of the grounds trial, the circuit court concluded that K.J. and A.W. were unfit. The court proceeded to disposition, where it ultimately concluded that termination of both parents' parental rights was in Diane's best interest. Both parents filed motions for postdispositional relief and notices of appeal.

¶5 After the TPR petition for Diane was granted, but while the appeal was pending, the State filed a petition to terminate both parents' parental rights to Andrew, alleging grounds of Continuing CHIPS and failure to assume parental

responsibility. The parents pled no contest to the Continuing CHIPS ground and the State dismissed the failure to assume ground.

¶6 K.J. and A.W. failed to appear at the dispositional hearing. K.J.'s counsel told the circuit court that K.J. contacted counsel in the morning and said that K.J.'s mother was ill in the hospital and K.J. was with her mother. A.W.'s counsel told the circuit court that A.W. called counsel that morning and said he had a seizure and would be unable to come to court. The circuit court called K.J. during the hearing. K.J. told the court that both she and A.W. were at the hospital for a family emergency. The circuit court instructed sheriff's deputies to confirm that K.J. and A.W. were actually at Froedtert Hospital. A deputy at the hospital was unable to locate either K.J. or A.W. The court contacted K.J.'s mother, who informed the court that she was not sick and was not at the hospital. The court continued the dispositional hearing and ultimately concluded that termination of both parents' parental rights was in Andrew's best interest.

¶7 Both parents filed notices to seek postdispositional relief and notices of appeal.

¶8 On October 10, 2016, this court remanded both parents' TPR cases regarding Diane to the circuit court, ordering the circuit court to "hold necessary proceedings and enter an order containing the circuit court's findings and conclusions resolving the motion" that is the subject of this appeal.

¶9 Both K.J. and A.W. filed postdisposition motions alleging, between the two motions, that: (1) the circuit court did not have competence to proceed in Diane's case because the CHIPS order underlying Diane's case expired when the circuit court found that the State failed to prove grounds in Diane's first TPR trial;

(2) counsel was ineffective for "failing to claim that the prior finding that the Bureau failed to provide reasonable services precluded any claim that the Bureau had provided reasonable services prior to the conclusion of [Diane's first] court trial"; and (3) the circuit court erroneously considered evidence relating to the abuse of Diane's older brother at Diane's grounds trial.

¶10 A remand hearing was scheduled, but prior to the hearing, the circuit court issued a decision denying the motions. This appeal follows.[4] Additional facts are included as relevant to this discussion.

DISCUSSION

¶11 On appeal, K.J. and A.W. argue that: (1) the circuit court erred when it denied the parents' postdisposition motions without a hearing; (2) the circuit court had no competence to proceed with Diane's second TPR because the underlying CHIPS order expired following the denial of the State's first TPR petition; (3) issue preclusion applied to the second TPR trial and counsel was ineffective for failing to raise the issue; (4) the circuit court erroneously considered evidence relating to the abuse of Diane's older brother; and (5) a finding of error causing reversal of Diane's case would necessitate reversal of Andrew's case pursuant to the doctrine of prejudicial spillover. We address each issue.

[4] We consolidated the parents' appeals concerning Diane on March 15, 2017.

I. The Circuit Court did not Err When it Denied the Postdisposition Motions Without a Hearing.

¶12 After the circuit court terminated K.J.'s and A.W.'s parental rights to Diane, both parents filed motions with this court requesting that we remand the matter to the circuit court for an evidentiary hearing. We remanded both parents' cases, directing the circuit court to "hold necessary proceedings and enter an order containing the circuit court's findings and conclusions resolving the motion." K.J. and A.W. subsequently filed briefs with the circuit court requesting postdispositional relief.

¶13 Upon review of the motions and the record, the circuit court denied their motions without a hearing. The circuit court found that "under no view of the assertions and claims made in either parents' brief is there any conceivable need for 'post-judgment fact-finding.'" K.J. and A.W. argue that the circuit court essentially ignored a directive from this court to hold an evidentiary hearing and that their motions alleged sufficient facts to warrant a hearing. We disagree.

¶14 We note first, that we did not order the circuit court to hold a postdispositional hearing. We directed the circuit court to "hold necessary proceedings." The court clearly determined, based upon the parties' briefs, that a hearing was not necessary. Second, if an appellant wishes to have an evidentiary hearing, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the circuit court may deny the motion without an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). When an appellant raises an ineffective assistance of counsel claim in a

termination of parental rights case, the appellant must allege with specificity both deficient performance and prejudice in the postdisposition motion. *See* ***id.*** at 313-18; *see also* **Oneida County DSS v. Nicole W.**, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652 (applying the two-part ***Strickland*** test in an involuntary termination of parental rights proceeding).[5] Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. *See* ***Bentley***, 201 Wis. 2d at 310. If the circuit court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the appellant is not entitled to relief, our review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. *See* ***id.*** at 318.

¶15 Neither K.J. nor A.J. alleged sufficient facts in their petitions that would entitle them to relief. The primary issues raised by both parents were that the circuit court lacked competency, counsel was ineffective, issue preclusion applied to Diane's second TPR, and the court erroneously considered certain evidence. None of these issues, as they were alleged in the parties' postdisposition briefs, automatically entitled K.J. and A.W. to an evidentiary hearing. Neither party explains the need for an evidentiary hearing or what facts exactly they would elicit in such a hearing.

II. The Circuit Court Did Not Lose Competency to Proceed in the Second TPR as to Diane.

¶16 K.J. and A.W. argue that the circuit court lost competency to proceed in the second TPR proceeding as to Diane because the circuit court, in the

[5] *See* ***Strickland v. Washington***, 466 U.S. 668 (1984).

first proceeding, was *required* to dismiss the TPR petition *immediately* upon finding that the State failed to prove grounds for termination under WIS. STAT. § 48.31(2). They contend that "when the court did not dismiss the TPR petition as required by law, the CHIPS petition became invalid for purposes of tolling the applicable time limits and the underlying CHIPS order expired as a matter of law" under WIS. STAT. § 48.315(1)(a).

¶17 Statutory interpretation is a question of law this court reviews *de novo*. *See* ***Hutson v. State of Wis. Pers. Comm'n***, 2003 WI 97, ¶31, 263 Wis. 2d 612, 665 N.W.2d 212. "Statutory sections found in the same chapter must be read *in pari materia* and harmonized so as to implement the chapter's goals and policy." ***Hernandez v. Allen***, 2005 WI App 247, ¶23, 288 Wis. 2d 111, 707 N.W.2d 557.

¶18 The parents' competency argument rests primarily on their assertion that WIS. STAT. § 48.31(2) required the circuit court to *immediately* dismiss the first TPR petition as to Diane when the court determined that the State failed to prove grounds; therefore, they argue, the CHIPS dispositional order underlying the first TPR expired when first the TPR was supposed to be dismissed. They argue that the extension of the dispositional order was invalid because the circuit court was required to dismiss the first petition on the same day it determined grounds did not exist. This argument fails for multiple reasons.

¶19 First, a plain reading of WIS. STAT. § 48.31(2) does not require that a circuit court immediately dismiss a TPR petition following a fact-finding hearing where the State fails to prove grounds. The statute provides:

> The hearing shall be to the court unless the child, the child's parent, guardian, or legal custodian, the unborn

> child's guardian ad litem, or the expectant mother of the unborn child exercises the right to a jury trial by demanding a jury trial at any time before or during the plea hearing…. If the court finds that the child … is not within the jurisdiction of the court or, in a case alleging a child … to be in need of protection or services …, that the child … is not in need of protection or services that can be ordered by the court, or if the court or jury finds that the facts alleged in the petition have not been proved, *the court shall dismiss the petition with prejudice.*

(Emphasis added.) The statute does not require a TPR petition to be dismissed "immediately." Indeed, the word "immediately" does not even appear in the statute. Elsewhere in WIS. STAT. ch. 48, the legislature has instructed the circuit court take particular actions "immediately." *See* WIS. STAT. § 48.424(4) (requiring the circuit court to immediately proceed to a disposition hearing following a fact-finding hearing, absent certain exceptions). The legislature's omission of the word "immediately" appears to be conscious. *See* ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2009 WI 27, ¶14 & n.9, 316 Wis. 2d 47, 762 N.W.2d 652 (noting that we cannot insert words into the text of a statute and must assume that words excluded from have been done so purposefully).

¶20 Such a conscious omission makes sense in this case because an immediate termination of the CHIPS disposition order upon an immediate dismissal of the first TPR would have required an immediate return of Diane to her parents. While the circuit court found that the DMCPS failed to provide certain services to K.J. and A.W., it also acknowledged significant domestic violence concerns in their home. Returning a child immediately to a home with a history of significant domestic violence is the antithesis of one of the main purposes of WIS. STAT. ch. 48, which is to ensure child safety.

¶21 The parents ignore the fact that neither parent objected to the State's request for an adjournment to extend and revise the CHIPS dispositional order following the circuit court's finding that the State failed to prove grounds. Indeed, at the extension hearing, both parents stipulated to a one-year extension and revision of the order. The parents cannot now argue that the circuit court lost competency to proceed with the second TPR as to Diane based upon an invalid extension of the underlying CHIPS order when they themselves agreed to the extension.

¶22 We conclude that the circuit court maintained competency throughout the pendency of the CHIPS and TPR hearings for Diane.

III. Issue Preclusion Does Not Apply to the Second TPR Trial.

¶23 K.J. and A.W. argue that issue preclusion applies because of the State's failure to prove that reasonable efforts were made by DMCPS at the first TPR trial. Specifically, they argue that the issue of whether DMCPS made reasonable efforts to provide the parents with appropriate services was previously litigated in the first trial and that it was an error for the circuit court to consider DMCPS's efforts up until April 25, 2013—the date the court made the finding that reasonable efforts were not made. K.J. and A.W. also argue that counsel was ineffective for failing to assert the application of issue preclusion to the second trial.

¶24 Under issue preclusion, a judgment in a prior action forecloses relitigation in a subsequent action of factual or legal issues that have been actually litigated and decided in the prior action. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). Issue preclusion is a narrower

doctrine than claim preclusion and requires the court to conduct a "'fundamental fairness' analysis before applying the doctrine." ***Id.*** at 551 (citation omitted).

¶25 Applying issue preclusion requires a two-step test. The first step, a determination whether the litigants were actually parties or were in privity with parties to the prior proceedings, is a question of law. ***Lauralie H.B. v. Steven G.B.***, 226 Wis. 2d 210, 224, 594 N.W.2d 370 (1999). The second step, a determination whether actually applying issue preclusion to the litigants comports with principles of fundamental fairness, is committed to the circuit court's discretion. ***Id.*** at 225. And, while the circuit court is to use its discretion in considering an array of factors to determine the fairness of applying issue preclusion, *see* ***Sumpter v. Crozier***, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327 (1993), certain factors will present questions of law. ***Lauralie H.B.***, 226 Wis. 2d at 225.

¶26 The circuit court found that issue preclusion did not bar consideration of reasonable efforts made by DMCPS prior to April 25, 2013, because "that determination was … highly relevant from the parents' perspective," and "[the circuit court], as trier of fact in the second proceeding, had an obligation to determine whether reasonable efforts were made to provide all mandated services during the entire period under consideration (pre- and post-April, 2013) in the second trial." The court determined that the "issue of whether the agency made reasonable efforts to provide the mandated services during the expanded period under consideration in the second TPR trial was not 'litigated and determined' in the first trial and hence the subsequent determination does not constitute 'relitigation.'"

¶27 We agree with the circuit court that the issue of whether DMCPS made reasonable efforts during the *entire* period of the CHIPS dispositional order was not litigated and was relevant to the circuit court's decision. Indeed, the CHIPS dispositional order at issue in the second TPR trial was not the same as the order at issue in the first trial. After the circuit court determined that the State failed to provide grounds in the first trial, the State moved for an adjournment in order to extend and revise the original dispositional order. The order was subsequently extended and revised, changing one of DMCPS's obligations.[6] Because of a change in the order, the factual issue before the circuit court in the second trial was not the same as in the first. Moreover, as the circuit court noted, the length of time Diane's case was pending was relevant to the circuit court's consideration of whether DMCPS had been making reasonable efforts to provide her parents with the appropriate services.

¶28 Because issue preclusion does not apply to the second TPR, counsel was not ineffective for failing to raise the issue. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (Counsel is not ineffective for failing to make meritless arguments.).

IV. Evidence as to Abuse of Diane's Older Brother was Admissible.

¶29 K.J. and A.W. argue that "[a]ny evidence that Diane may have been removed from K.J. and A.W. because of alleged injuries sustained by David [Diane's older brother] was not properly admissible under the facts of this case"

[6] The original CHIPS order, issued on September 20, 2011, included a requirement that the parents participate in family counseling. The extended and revised order removed that requirement and instead ordered participation in a domestic violence program.

because: (1) the evidence was not relevant; and (2) even if it was relevant, its prejudicial nature outweighed its probative value. We disagree.

¶30 Evidentiary decisions are upheld on appeal unless the circuit court erroneously exercised its discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). If the circuit court considered the pertinent facts, applied the correct law, and reached a reasonable conclusion, this court will conclude that it properly exercised its discretion. *See **id.*** Here, this standard was satisfied.

¶31 Prior to Diane's second TPR trial, the State sought to admit evidence that Diane's older brother, David, was abused while in K.J.'s and A.W.'s care. The State argued that "the incident that gave rise to the detention for both kids related substantially to severe physical abuse suffered by [David]." The State argued that the parents denied ever abusing David and claimed to not know the source of his injuries, giving rise to a significant safety concern for Diane.[7] The court found the evidence admissible as relevant to the circumstances under which Diane was removed, whether the parents have met their conditions for return, and for credibility purposes because K.J. and A.W. denied harming David. However, the court limited the State's use of such evidence and ordered the evidence to be tailored to not confuse or overwhelm the jury. Six months later, on the day trial was set to begin, K.J. and A.W. waived their right to a jury trial. K.J. and A.W. now argue that the circuit court's erroneous ruling induced them to waive their right to a jury trial.

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[7] David is not A.W.'s biological child, but was living with K.J. and A.W. at the time he was removed from their home.

¶32 We agree with the circuit court that the limited evidence of David's abuse was relevant to Diane's case. We have previously held that the admission of a parents' prior conduct is admissible if it is necessary for a fact-finder to piece together "the complete story." ***Modesto F. v. Christal M.***, 2004 WI App 106, ¶21, 272 Wis. 2d 816, 681 N.W.2d 289. In ***Modesto F.***, we concluded that a parent's "prior convictions … are not so prejudicial as to outweigh their probative value where the information would lead the [fact-finder] to an understanding of why children are removed from the parent's home." ***Id.***, ¶20. Similarly, in ***La Crosse County DHS v. Tara P.***, 2002 WI App 84, 252 Wis. 2d 179, 643 N.W.2d 194, we concluded "that the facts occurring prior to a CHIPS dispositional order are frequently relevant to the issues at a termination proceeding." ***Id.***, ¶10. We noted that it "is readily apparent that a history of parental conduct may be relevant to predicting a parent's chances of complying with conditions in the future, despite failing to do so to date." ***Id.***, ¶13.

¶33 Here, the discovery of abuse to David is what led to Diane's removal from her parental home. Moreover, both K.J. and A.W. denied abusing David. The parents were ordered to complete multiple programs in order to achieve reunification with their children, one such program for A.W. was anger management. In order to assess the safety risk to Diane, evidence of abuse in the home towards another a sibling was relevant to the circuit court's determination as to whether the parents could meet the conditions for Diane's return. Accordingly, we conclude that the circuit court did not erroneously exercise its discretion in admitting evidence of abuse suffered by David.

V. **Prejudicial Spillover**.

¶34 Finally, K.J. and A.W. argue that any error requiring reversal of Diane's case also requires a reversal in Andrew's case pursuant to the doctrine of prejudicial spillover.[8] We find no error in the circuit court's decision in Diane's case; hence, we do not address this issue.

¶35 Accordingly, the circuit court was within its discretion to deny an evidentiary hearing and decide the parties' postdisposition motions based upon the parties' briefs and the record. For the foregoing reasons, we affirm the circuit court.

By the Court.—Orders affirmed.

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

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[8] Prejudicial spillover is the retroactive misjoinder of two claims. *See* ***State v. McGuire***, 204 Wis. 2d 372, 379-380, 556 N.W.2d 111 (Ct. App. 1996). In order to invoke a claim of prejudicial spillover, the party making the assertion must show '"compelling prejudice."' ***Id.*** at 379 (citation omitted). We consider three factors in making a determination that a party has suffered from prejudicial spillover: "(1) whether the evidence introduced to support the dismissed count is of such an inflammatory nature that it would have tended to incite the [fact-finder] to convict on the remaining count; (2) the degree of overlap and similarity between the evidence pertaining to the dismissed count and that pertaining to the remaining count; and (3) the strength of the case on the remaining count." *See* ***id.*** at 379-380.