COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2005

Cornelia G. Clark
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. 2005AP46
2005AP47
STATE OF WISCONSIN

Cir. Ct. Nos. 2002TP535
2002TP536

IN COURT OF APPEALS
DISTRICT I

NO. 2005AP46
IN RE THE TERMINATION OF PARENTAL RIGHTS TO PAULETTE G., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHELLE M.,

RESPONDENT-APPELLANT.

NO. 2005AP47
IN RE THE TERMINATION OF PARENTAL RIGHTS TO EMILY M., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHELLE M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: CHRISTOPER R. FOLEY, Judge. *Affirmed*.

¶1 WEDEMEYER, P.J.[1] Michelle M. appeals from orders terminating her parental rights to her daughters, Paulette G. and Isis M.[2] She claims the trial court erroneously admitted statements she made to psychologists in violation of the physician-patient privilege, WIS. STAT. § 905.04 (2003-04).[3] She also contends that the evidence was insufficient to find that she never assumed parental responsibility for her children. Because the trial court did not erroneously exercise its discretion in admitting the challenged evidence and because there is sufficient evidence in the record to support the termination, this court affirms.

BACKGROUND

¶2 Paulette G. was born on November 4, 1992. She was first placed into foster care on April 5, 1996, and remained there until April 1998. She was then returned to Michelle's home under an order of supervision until December

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

[2] Isis M. and Emily M. are the same person. Isis's name was changed to Emily at some point after she was placed in foster care. The parties, however, have agreed to refer to her by her birth name of Isis.

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

1998. Isis was born on April 15, 1999. In January of 2000, police were called to Michelle's home due to a domestic fight between Michelle and her mother. When the police arrived, they found the home to be in deplorable condition. Social Services was called and the children were removed from the home.

¶3 A court order finding the children in need of protection and services pursuant to WIS. STAT. § 48.13(10) was entered on August 30, 2000. Michelle was warned that if she failed to complete her court conditions for the return of the children, her parental rights could be terminated. One of the conditions was for Michelle to undergo a psychological evaluation. On separate occasions, Michelle participated in psychological evaluations with Dr. Kenneth Sherry and with Dr. Stephen Emiley.

¶4 On July 23, 2002, the State filed a petition seeking to terminate Michelle's parental rights. The petition alleged both failure to assume parental responsibility, under WIS. STAT. § 48.415(6), and that the children remained in continuing need of protection or services, under WIS. STAT. § 48.415(2).

¶5 After several legal delays involving substitution of court, counsel, and trial dates, the case was set for trial on May 17, 2004. Michelle filed a motion *in limine* seeking to exclude from evidence statements she made to Dr. Sherry and Dr. Emiley during the psychological evaluations. A hearing was held on the motion, during which Michelle, Dr. Emiley and Dr. Sherry testified. At the conclusion of the hearing, the trial court ruled that the substance of the psychological evaluations was not privileged in that Michelle did not have an objective expectation of confidentiality. The trial court also found that even if the statements were privileged, an exception, WIS. STAT. § 905.04(4)(b), applied due

to the fact that the psychological examinations were court-ordered. Accordingly, the trial court denied the motion.

¶6 At the conclusion of the trial, the jury found grounds existed to terminate Michelle's parental rights. At the dispositional hearing, the trial court found it was in the best interests of the children to terminate parental rights. Accordingly, a judgment was entered to that effect and Michelle now appeals.[4]

DISCUSSION

¶7 The first issue in this case is whether the trial court erroneously exercised its discretion in allowing into evidence statements Michelle made to the psychologists during her court-ordered evaluations. Michelle claims the trial court erred as a matter of law because those statements are confidential under the physician-patient privilege. The State responds that the statements were not privileged and, even if privileged, could be admitted under an exception to the privilege. The State also contends that even if the statements were not privileged and no exception applied, the admission was harmless.

¶8 In reviewing evidentiary rulings, this court reviews a trial court's decision to admit evidence in order to determine whether the trial court erroneously exercised its discretion. ***LaCrosse County DHSS v. Tara P.***, 2002 WI App 84, 252 Wis. 2d 179, 643 N.W.2d 194. This court will not reverse a discretionary determination as long as the trial court considered the pertinent facts, applied the correct law, and reached a reasonable determination. *See* ***State v.***

[4] The petition also terminated the parental rights of Paulette's and Isis's fathers. Neither father challenges the termination.

Wollman, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). In addition, whether a statement is privileged under a statute involves statutory interpretation, which presents a question of law. ***State v. Joseph P.***, 200 Wis. 2d 227, 233, 546 N.W.2d 494 (Ct. App. 1996); ***State v. Aaron D.***, 214 Wis. 2d 56, 60, 571 N.W.2d 399 (Ct. App. 1997).

¶9 The record reflects that the trial court considered the pertinent facts in addressing Michelle's motion to exclude the statements she made during the psychological evaluations. The facts in this case are essentially undisputed. Michelle concedes that she underwent the psychological evaluations because the court ordered her to do so. She also admits that before each evaluation, the limits on the confidentiality of the exam were explained to her. She knew that the evaluations would be disclosed to the court, to the parties, to the attorneys and to the social worker. She also admits that both psychologists presented her with release forms to review and sign, which explained the limitations on confidentiality of the evaluations. Both forms were received into evidence.

¶10 Dr. Emiley's form specifically warned: "There are limits to your confidentiality in this situation as the examiner must summarize his findings and submit a written report to the court, lawyers, social workers, and/or probation officers assigned to this case." This warning is repeated in bold print a second time. Dr. Sherry's form is even more explicit, stating: "What we talk about <u>is not confidential</u>." It further indicates that the evaluation will be released to the court, the attorneys, and social workers.

¶11 The record also demonstrates that the trial court applied the correct law to these facts. The statutory privilege asserted here is that of physician-patient confidentiality. Michelle argues that WIS. STAT. § 905.04(2) provides that a

"patient" can "prevent any other person from disclosing confidential communications made … for purposes of diagnosis or treatment of the patient's … mental … condition …." Thus, she contends that when she asserted this statutory privilege, the trial court should have granted her motion. This court cannot agree under the facts and circumstances of this case.

¶12 This court concludes that even if Michelle's statements were protected under the physician-patient relationship, the statements fall under the court-ordered exception to the privilege. WISCONSIN STAT. § 905.04(4)(b) provides that: "If the judge orders an examination of the … mental … condition of the patient … communications made and treatment records reviewed in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise." There is no dispute here that the psychological evaluations were court-ordered.

¶13 Michelle claims, however, that the "particular purpose" was limited to the CHIPS proceedings and she did not know the doctors' reports would be used against her in a TPR proceeding. Her contention does not render the court-ordered exception to admission inoperative. As the trial court noted, the purpose for the psychological evaluations was to "protect[] the ultimate best interests and general welfare of these children, whether that be through reunification or other permanent placement." CHIPS and TPR proceedings are on a continuum "aimed at the ultimate goal of permanent, safe, appropriate placement for children …." Based on the trial court's logic, Michelle's attempt to narrowly define the purpose of the evaluations is unpersuasive. In addition, Dr. Emiley's evaluation occurred *after* the termination petition had been filed. Thus, the August 2002 evaluation was clearly done in the context of the TPR proceeding.

¶14 Michelle points to ***State v. Joseph P.***, 200 Wis. 2d 227, 546 N.W.2d 494 (Ct. App. 1996) in asserting that she had an "objectively reasonable" belief that her communications with the psychologists were confidential and would not be released to anyone other than the judge, lawyer or social worker involved in the case. The trial court held that ***Joseph P.*** was distinguishable from this case. This court agrees.

¶15 In ***Joseph P.***, this court held that Joseph had an "objectively reasonable belief" that statements he made to a Department of Corrections psychologist, who evaluated him during the intake process following his criminal conviction for sexually assaulting his daughters, would be confidential. ***Id.*** at 235. This conclusion was reached despite the fact that Joseph received a manual advising him that communications with prison psychologists would be shared with other "team members." ***Id.***

¶16 The facts in Michelle's case are very different. Michelle was ordered to participate in the psychological evaluations during the proceeding of a CHIPS and TPR case. She was not seen in the process of intake into jail as a result of a criminal conviction. Moreover, Michelle was specifically advised that the information she shared had limited confidentiality or was not confidential at all. She also admits that she was advised that this information would be shared with a variety of other people, including the court, the lawyers, the parties and the social workers. Joseph, on the other hand, was never personally warned of any limited confidentiality, but rather the warning was contained within a prison manual given to Joseph. Moreover, the manual indicated the results of the psychological evaluation would be shared with other "team members," suggesting that the sharing of information would stay within the members of the psychological team. Clearly then, Michelle's case, and consequently her belief as

to confidentiality, is very different from Joseph's. Accordingly, based on the foregoing, this court concludes that Michelle did not have an objectively reasonable expectation that her statements during the evaluations would be confidential.

¶17 Finally, this court agrees with the State that even if Michelle's statements should not have been admitted, their admission constituted harmless error. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985). There is no reasonable probability of a different outcome on remand if Michelle's statements to the psychologists had been excluded. The evidence that Paulette and Isis were in continuing need of protection or services, and that Michelle had failed to complete the required conditions for return, was overwhelming. Even without the challenged evidence, the result of this proceeding would have been the same. Accordingly, we reject Michelle's request for a new fact-finding hearing.

¶18 The second issue Michelle raises relates to the sufficiency of the evidence on the failure to assume parental responsibility ground. She argues that there were some times during the daughters' lives that Michelle did assume parental responsibility and, therefore, the evidence is insufficient to conclude that she *never* assumed parental responsibility.

¶19 This court need not address Michelle's argument in this regard because the jury found two bases existed sufficient to justify termination of parental rights—the jury found both that the girls continued to be children in need of protection or services and that Michelle failed to assume parental responsibility. Michelle does not challenge the sufficiency of the evidence as it relates to the CHIPS ground, undoubtedly because any challenge to the jury finding in this regard would be without merit. The jury was presented with overwhelming

evidence necessary to conclude that grounds existed for termination of Michelle's parental rights on the CHIPS ground. Therefore, it is unnecessary for this court to address the sufficiency of evidence claim as to the second ground for termination. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).

By the Court.—Orders affirmed.

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