COURT OF APPEALS DECISION DATED AND FILED

June 5, 2007

David R. Schanker
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. 2007AP529

Cir. Ct. No. 2006TP16

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JEANINE W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Jeanine W. appeals from an order terminating her parental rights to Ericka W. Jeanine claims the trial court erred in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06).

denying her request for a competency exam, and that the trial court erroneously exercised its discretion when it denied her motion for a new trial based on potential juror misconduct. Because the trial court had already appointed a *guardian ad litem* for Jeanine, a competency evaluation was not necessary; further, because Jeanine has failed to demonstrate that extraneous prejudicial information was disclosed to the jury, this court cannot order a new trial on her juror misconduct claim. Accordingly, this court affirms.

BACKGROUND

¶2 Ericka was born on April 24, 2004, weighing five pounds, seven ounces. On May 13, 2004, Ericka was removed from Jeanine's care as her weight had decreased to four pounds, six ounces. Ericka's pediatrician diagnosed her with "failure to thrive" and stated that she was "significantly malnourished." After her first week in foster care, Ericka's weight increased to five pounds, eleven ounces.

¶3 During the time that Ericka was removed from Jeanine's care, the Bureau of Milwaukee Child Welfare provided Jeanine with a variety of services to assist her in completing the court-ordered conditions for Ericka's return. On January 23, 2006, the State filed a petition seeking to terminate Jeanine's parental rights to Ericka, alleging two grounds: (1) that Ericka remained in continuing need

of protection and services; and (2) that Jeanine had failed to assume parental responsibility.[2]

¶4 The trial court appointed an attorney to represent Jeanine and at that attorney's request, also appointed a *guardian ad litem* for Jeanine. The GAL was appointed due to the psychological evaluations in the CHIPS case, which revealed that Jeanine was cognitively disabled, functionally illiterate, and had substantial physical problems. After Jeanine failed to appear in court on several scheduled dates, the trial court found her in default and discharged her GAL.

¶5 On June 1, 2006, Jeanine appeared in court and requested that the default order be vacated. The trial court granted the request, and re-appointed the GAL. The GAL requested that a competency evaluation be conducted with respect to Jeanine. The trial court denied the request.

¶6 The grounds phase of the proceeding proceeded to a jury trial on July 10, 2006. On July 13, 2006, at the conclusion of the trial, the jury found that Ericka continued to be a child in need of protection and services, thus, grounds existed for termination.[3] On July 14, 2006, the assistant district attorney who had represented the State at trial filed a letter with the court advising that he had received information that a juror may have discussed the case, and obtained information outside of the record during the trial. The State disclosed that one of

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[2] The petition also sought to terminate the parental rights of Eric W., Ericka's adjudicated father. Eric did not contest the petition or appear and, thus, his rights were terminated. The State also filed a petition to terminate the parental rights of Jeanine's son Calvin, who was born October 6, 1997. The two petitions were litigated simultaneously. Jeanine only appealed from the order terminating her parental rights to Ericka.

[3] The jury did not find that Jeanine failed to assume parental responsibility.

the jurors had told her mother that she was on a jury where a woman left Wisconsin for a month to go to Nebraska with only fifty dollars.[4] Her mother responded that she had proofread the deposition of the parent, for her cousin who was a court reporter. At that point, the conversation apparently ceased.

¶7 On August 2, 2006, Jeanine filed a motion to set aside the verdict and requested a new trial. No additional information about the conversation or any affidavit from the juror was submitted. On August 24, 2006, the trial court conducted a hearing on the motion and concluded that Jeanine had failed to produce sufficient evidence demonstrating that the juror received extraneous prejudicial information. As a result, the motion was denied and the case proceeded to the dispositional phase of the proceeding. At the conclusion of the hearing, the trial court found that the termination of Jeanine's parental rights would be in Ericka's best interests and entered an order so ruling. Jeanine now appeals from that order.

DISCUSSION

A. Due Process.

¶8 Jeanine first claims that the trial court erred in denying her GAL's motion requesting a competency examination. She contends that the statutes and due process unambiguously require that a competency evaluation be conducted under the facts and circumstances of this case. The trial court ruled that a competency examination was not necessary because it had already appointed a

[4] During the first day of the trial, testimony was received that Jeanine had left Wisconsin with her fiancé to go to Nebraska, where she remained for a month and that she had only fifty dollars for the trip.

GAL for Jeanine. This court concludes that the trial court's decision was not erroneous.

¶9 Interpretation of statutes is a question of law that this court reviews independently. ***State v. Aaron D.***, 214 Wis. 2d 56, 60, 571 N.W.2d 399 (Ct. App. 1997). Statutory construction begins with a review of the statutory language; if it is not ambiguous, the role of this court is to apply the plain meaning of the statute. ***In re Paternity of LaChelle A.C.***, 180 Wis. 2d 708, 713, 510 N.W.2d 718 (Ct. App. 1993). This court concludes that the statutory language applicable in this case is clear and unambiguous.

¶10 WISCONSIN STAT. § 48.295(1) and § 48.235(1)(g) address the law with respect to ordering competency evaluations in termination of parental rights cases. The statutes provide that: "The court *may* … order a … psychological, mental, or developmental examination … assessment … of a parent …whose ability to care for a child is at issue before the court …" (Emphasis added.) WIS. STAT. § 48.295(1)(g); and

> The court *shall* appoint a guardian ad litem for a parent who is the subject of a termination of parental rights proceeding, *if* any assessment or examination of a parent that is ordered under s. 48.295(1) shows that the parent is not competent to participate in the proceeding or to assist his or her counsel or the court in protecting the parent's rights in the proceeding.

WIS. STAT. § 48.235(1)(g) (Emphasis added.) The plain language in this statute demonstrates that the trial court's decision to order a competency examination is discretionary. If the trial court exercises that discretion and orders an examination, which shows that the parent needs assistance, then the trial court *shall* appoint a GAL. Thus, the appointment is mandatory under such circumstances. In the instant case, the trial court elected to bypass the first step, and appointed a GAL.

Based on the circumstances in this case, that decision was appropriate. It was undisputed that Jeanine had a low IQ and functioning difficulties. This was evident based on the CHIPS record, wherein psychological evaluations were conducted. Thus, the trial court's decision to forgo an additional evaluation, which most likely would have resulted in the appointment of a GAL, in favor of simply appointing a GAL immediately, was reasonable and not prejudicial.

¶11 This court is not persuaded by Jeanine's contention that if a more recent examination was conducted, the information would have provided the appointed GAL with more specifics as to Jeanine's condition, and in turn, the GAL could have been of greater assistance. The record reflects that the appointed GAL attended every court hearing with Jeanine and her counsel. He also reviewed all of the discovery documents in the record. The record demonstrates that the GAL provided information to the trial court and to Jeanine's counsel. Thus, Jeanine's claims in this respect are not persuasive.

¶12 Jeanine also asserts that by skipping the competency evaluation, her rights to due process were violated. This court cannot agree. Application of the due process clause to undisputed facts presents an issue of law reviewed independently. *See* ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995). In termination of parental rights, this court is respectful of the fact that a parent's right to a child is a substantive right, requiring both substantive and procedural due process protections. *See* ***D.G. v. F.C.***, 152 Wis. 2d 159, 167, 448 N.W.2d 239 (Ct. App. 1989). Thus, a parent must be afforded the meaningful opportunity to be heard. ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 701, 530 N.W.2d 34 (Ct. App. 1995).

¶13 Here, the record reflects that Jeanine was afforded due process protection. She had both legal counsel and a GAL to assist her through the entire proceeding. In termination of parental rights proceedings, due process is provided by the appointment of a guardian ad litem in addition to adversary counsel. *See* ***I.P. v. State***, 157 Wis. 2d 106, 114-15, 458 N.W.2d 823 (Ct. App. 1990). There is no indication in the record that any additional benefit would have accrued to Jeanine if the trial court would have ordered another competency evaluation before appointing the GAL. Jeanine speculates that the GAL may have been better able to advocate on her behalf had such evaluation taken place, but this assertion is pure speculation. Based on the record before this court, Jeanine was afforded proper due process protection, she was given a meaningful opportunity to be heard and present her case, and there were no constitutional violations.

B. Juror Misconduct.

¶14 Jeanine next contends that the trial court erred in denying her request for a new trial or evidentiary hearing based on the allegations that a juror discussed the case with the juror's mother, who coincidentally was asked to proofread a deposition in this case. Jeanine contends that as a result of this incident, the juror may have been biased or prejudiced by extraneous information, and if so, then she is entitled to a new trial. This court is not persuaded.

¶15 Whether to grant a motion for a new trial involves the exercise of discretion, and the trial court's decision will not be reversed by this court unless it erroneously exercised its discretion. ***Manke v. Physicans Ins. Co.***, 2006 WI App 50, 289 Wis. 2d 750, 712 N.W.2d 40. WISCONSIN STAT. § 906.06(2) prohibits a juror from testifying about the deliberations in a case. The statute does allow a juror to testify about whether extraneous information was improperly brought to

the attention of the jury. If such an allegation is made, WIS. STAT. § 906.06(2) provides that the trial court should ascertain whether: (1) the juror's testimony would concern extraneous information; (2) the extraneous information was improperly brought before the jury; and (3) the extraneous information was potentially prejudicial. ***Manke***, 2006 WI App 50, ¶19. The burden to show that the jury was exposed to extraneous prejudicial information is on the aggrieved party. ***Id.***,¶25.

¶16 Here, the trial court found that there was no extraneous, prejudicial information brought to the attention of the jury. The only evidence submitted to the court indicated that the juror's mother had proofread Jeanine's deposition and had a "conversation" about the case. The only contents of that conversation in the record are that the juror disclosed to her mother that she was on a jury where a woman left Wisconsin for a month to go to Nebraska with only fifty dollars. The mother then responded that she had read a deposition containing the same facts. Then the conversation ceased. There is a dispute as to whether this conversation occurred during the trial or after the verdict.

¶17 Jeanine failed to present the trial court with any information demonstrating that extraneous information was presented. Instead, she submitted an affidavit stating that the juror violated the trial court's instruction not to discuss the case during the trial by talking to her mother about the case and that this conversation may have influenced the juror, who in turn, could have influenced other members of the jury. Such submissions are insufficient to require an evidentiary hearing or a new trial. Jeanine failed to satisfy her burden of proving by clear and convincing evidence that extraneous, prejudicial information reached the jury in this case. Accordingly, the trial court did not err in denying her motion for a new trial.

C. Interest of Justice.

¶18 Jeanine also asserts that she should be granted a new trial in the interest of justice, pursuant to WIS. STAT. § 752.35. In this argument, Jeanine contends that the combination of her cognitive disability, and any potential influence by the juror who spoke with her mother about the case rendered the outcome in this case unjust. This court cannot agree.

¶19 Although the record does reflect that Jeanine had difficulty during her testimony due to her cognitive abilities, this case was not about Jeanine's intelligence or ability to following legal questioning. Rather, the issue before the jury was whether Jeanine would be able to parent her children. The jury was properly instructed as to their role and responsibility and nothing has been presented to this court indicating that the jury failed to properly carry out their duty. Moreover, as the court already indicated earlier in this opinion, there was insufficient evidence to support Jeanine's claim that the juror committed misconduct, or that the juror was exposed to prejudicial extraneous information, or that the juror improperly influenced the jury. Accordingly, this court affirms the order terminating Jeanine's parental rights.

By the Court.—Order affirmed.

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