COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 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. 2011AP693 **Cir. Ct. No. 2008TP336**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

HENRY W.,

RESPONDENT-APPELLANT,

ELIZABETH A.,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: RUSSELL W. STAMPER, Reserve Judge. *Affirmed.*

¶1 FINE, J. Henry W. appeals the order terminating his parental rights to Abieail A. We affirm.

I.

¶2 Abieail was born in March of 2004 to Henry W. and Elizabeth A.[1] She is a non-marital child. She was removed from the home of Henry W. and Elizabeth A. in the middle of February, 2005, and has been outside of their home ever since. As part of the order finding Abieail to be a child in need of protection or services, *see* WIS. STAT. § 48.13(10), Henry W.'s ability to regain her custody depended on his fulfilling certain specified conditions, *see* WIS. STAT. §§ 48.356 & 48.415(2)(a)1 & 3. Among the conditions was that he "[s]how that [he] can care for and supervise [Abieail] properly, that [he] understand any special needs [Abieail] may have, and that [he] can take care of these special needs."

¶3 Termination of parental rights is a two-step process. First, a fact-finder decides whether there are facts that justify governmental interference in whatever relationship there is between the birth-parent and his or her child. WIS. STAT. §§ 48.415, 48.424. If there are grounds to terminate a person's parental rights to a child, the trial judge then determines whether those rights should be terminated. WIS. STAT. §§ 48.424(3), (4); 48.426; 48.427.

¶4 A jury found that that the State had proven that: (1) Abieail had "been adjudged to be in need of protection or services and placed outside [Henry W.'s] home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required

[1] The termination of Elizabeth A.'s parental rights to Abieail is not part of this appeal.

by law"; (2) the responsible social service agency made "a reasonable effort to" give to Henry W. "the services ordered by the court"; (3) "Henry W[.] failed to meet the conditions established for the safe return of [Abieail] to Henry W[.]'s home"; and (4) there was "a substantial likelihood that Henry W[.] will not meet these conditions within the nine-month period following the conclusion of" the trial. These were grounds to terminate Henry W.'s parental rights to Abieail under WIS. STAT. § 48.415(2).

¶5 Henry W. sought an order *in limine* before trial preventing the State from having Renee Genin, as family therapist who did a bonding-assessment evaluation of Henry W.'s interaction with Abieail, testify during the grounds phase. Henry W.'s written motion argued:

> Whether a bond exists between a foster parent or a natural parent and child is not an issue for the jury to consider in the grounds phase of a termination of parental rights proceedings. This is evidence which is only admissible during a dispositional phase. Likewise Ms. Genin's observation of parenting practices is not relevant during the grounds phase.

¶6 The State told the circuit court that it was not calling Genin to testify about the respective bondings of the foster parents and Henry W., but, rather, it wanted Genin to "testify as to how the child's view of her father would make it difficult for the father to provide -- meet the conditions of return: that he demonstrate the ability to care for and supervise her properly -- how the child's view of him would impact his ability to meet that condition of return." The circuit court agreed with the State that the testimony was admissible in the grounds phase.

¶7 Genin testified, in essence, that Abieail's interaction and lack of interaction with Henry W. during the session indicated to her that Abieail did not perceive Henry W. as someone who could meet her needs. She opined that even

though Henry W. "was a very loving and well-intended parent," he would have trouble caring for the girl if she lived with him.

¶8 As noted, the jury found that there were grounds to terminate Henry W.'s parental rights to Abieail. The circuit court then concluded that termination of Henry W.'s parental rights to Abieail was in Abieail's best interests. *See* WIS. STAT. §§ 48.426 & 48.427. Henry W. asserts two claims of circuit-court error: (1) He contends that the circuit court erroneously exercised its discretion in letting a bonding-assessment family therapist testify during the grounds phase; and (2) That the circuit court erroneously exercised its discretion by not adjourning the disposition phase to give Henry W. a chance to get his own bonding-assessment expert.

II.

¶9 Henry W.'s appellate issues implicate a circuit court's receipt or exclusion of evidence, and its ability to control its calendar. Both matters are vested in the circuit court's discretion. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30, 36 (1998) (receipt of evidence); ***Hefty v. Strickhouser***, 2008 WI 96, ¶31, 312 Wis. 2d 530, 546–547, 752 N.W.2d 820, 828 (docket control). We will sustain a discretionary determination if "the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Sullivan***, 216 Wis. 2d at 780–781, 576 N.W.2d at 36. We now turn to Henry W.'s contentions on this appeal.

1. *Genin's testimony.*

¶10 As we have seen, one of the conditions that Henry W. had to meet in order to regain custody of Abieail was that he could effectively "care for and supervise" her. Evidence is "relevant" if it is both "of consequence" to an issue in the case and the evidence makes the facts used to establish that material matter more or less likely. *See* WIS. STAT. RULE 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."). Thus, as framed by the State's offer of proof, Genin's testimony was "relevant" under RULE 904.01. The circuit court therefore did not erroneously exercise its discretion in denying Henry W.'s motion *in limine* to bar Genin's testimony. Significantly, although her bonding assessment was marked as an exhibit, it was neither read to the jury nor sent to the jury room for the jury's consideration.

2. *Henry W.'s request for an adjournment to get his own bonding-assessment expert for the second phase of the proceedings.*

¶11 After the jury returned its verdict, Henry W.'s lawyer asked the circuit court for an adjournment so he could get approval from the Office of the State Public Defender for "a bonding assessment from a different expert." The lawyer indicated: "The expert I have in mind has testified and is a bonding expert in these courts many times." Over the lawyer's contention that it "would not be prudent" for him to have sought approval to hire the expert earlier, the circuit court ruled that his request came too late, noting that the statute says that the dispositional hearing should be held "immediately" after a fact-finder finds that

there are grounds to terminate the person's parental rights to his or her child, unless, as material, everyone agrees to the adjournment.[2]

¶12 Although there might be circumstances where despite the statute's "immediately" command, an adjournment would be required so that a person could adequately contest the second phase of a termination-of-parental-right proceeding, Henry W.'s appellate briefs have not even alleged what his bonding expert would have testified to at the second phase had the circuit court given him time to get one. *Cf.* WIS. STAT. RULE 901.03(1)(b) (error may not be predicated on exclusion of evidence unless there is an offer of proof as to what the evidence would show). Accordingly, we cannot conclude that the circuit court erroneously exercised its discretion in denying the adjournment.

[2] WISCONSIN STAT. § 48.424(4) provides:

> If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit. A finding of unfitness shall not preclude a dismissal of a petition under s. 48.427(2). The court shall then proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 48.427. Except as provided in s. 48.42(2g)(ag), the court may delay making the disposition and set a date for a dispositional hearing no later than 45 days after the fact-finding hearing if any of the following apply:
>
> (a) All parties to the proceeding agree.
>
> (b) The court has not yet received a report to the court on the history of the child as provided in s. 48.425 and the court now orders an agency enumerated in s. 48.069(1) or (2) to file that report with the court, or, in the case of an Indian child, now orders that agency or requests the tribal child welfare department of the Indian child's tribe to file such a report, before the court makes the disposition on the petition.

By the Court.—Order affirmed.[3]

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

[3] Henry W. seeks to raise a new issue (contending that guardianship rather than termination would have been more appropriate) in his reply brief, which was filed late. We do not consider issues or arguments raised for the first time in a reply brief. *See* ***Richman v. Security Savings & Loan Ass'n***, 57 Wis. 2d 358, 361, 204 N.W.2d 511, 513 (1973).