COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. **2012AP167**
2012AP168
2012AP169
2012AP444
2012AP445
2012AP446

Cir. Ct. Nos. **2009TP000314**
2009TP000315
2009TP000316
2009TP000314
2009TP000315
2009TP000316

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO ENISHA H., PERSONS UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

STACEE P.,

RESPONDENT-APPELLANT,

ELBERT H.,

RESPONDENT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO EQUON H., PERSONS UNDER THE AGE OF 18:

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

¶1 FINE, J. Stacee P. and Elbert H. appeal the orders terminating their parental rights to Enisha H., Equon H., and Elijah H. that were entered after a jury found that the State had proven that there were grounds for the circuit court to consider whether termination would be in the children's best interests. *See* WIS. STAT. §§ 48.424(1)(a), (4); 48.426(2), (3). The parents are represented by different lawyers and the appeals are separate although we address both in this opinion in sequence. We affirm.

¶2 Enisha H., Equon H., and Elijah H. were born in January of 2005, December of 2005, and November of 2006 respectively. On October 14, 2009, the

State filed the petition to terminate Stacee P.'s and Elbert H.'s parental rights to the children. We turn first to Stacee P.'s appeal.

Stacee P.'s appeal

I.

¶3 The State alleged that termination of Stacee P.'s parental rights to the children was warranted under WIS. STAT. § 48.415(2). As material, this section provides that it is a ground to terminate a person's parental rights to his or her child if:

- "the child has been adjudged to be a child … in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders"; and
- "the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders[,]"; and
- "the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 9-month period following the fact-finding hearing under s. 48.424."

Sec. 48.415(2)(a)1., 3. An important proviso, however, is that "the agency responsible for the care of the child and the family … has made a reasonable effort to provide the services ordered by the court." Sec. 48.415(2)(a)2b. "In this subdivision, 'reasonable effort' means an earnest and conscientious effort to take

good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child … the level of cooperation of the parent … and other relevant circumstances of the case." Sec. 48.415(2)(a)2a.

¶4 Stacee P.'s only contention on this appeal is that the trial court erred in determining that the "reasonable effort" obligation encompassed things that the responsible agency did after the date the petition was filed. Significantly, however, Stacee P. does not develop any argument that evidence of what the agency did before October 14, 2009 (the petition's filing date) does not support the jury's finding that, in the words of the special verdict, the agency "ma[d]e a reasonable effort to provide the services ordered by the court to assist the parent in meeting the conditions of safe return." Nevertheless, we consider whether the trial court erred in letting the jury also consider what the agency did after the petition was filed and up to the date of the jury trial.

II.

¶5 As noted, Stacee P.'s sole argument on appeal is that the agency responsible for helping her meet the court-ordered conditions for the return of her children had to make the "reasonable effort" before the State filed the petition to terminate her parental rights, and what the agency did after that was not material to the agency's "reasonable effort" obligation. The issue arose during the closing argument of the children's guardian *ad litem*:

> The date that you look at that performance by the [agency], is not today when we have [the agency social worker] who comes in and has a lovely relationship with

> [Stacee P.], who has worked hard with her. That is not the date you're looking [at]. You're looking at October 14, 2009, which is the date that this Petition was filed. That's the date you're looking at.

The trial court interrupted, and asked the jury to take a break. After discussing the matter with the lawyers, the trial court indicated that it was its view that the jury could consider what the agency had done up to the date of the jury trial in assessing whether the agency satisfied the "reasonable effort" requirement. Accordingly, when the jury returned, the trial court told it:

> [The guardian *ad litem*] asserted in her argument that the Jury's determination as to whether the Bureau of Milwaukee Child Welfare made a reasonable effort to provide the services mandated by the Court to assist the parents in meeting the conditions of safe return, is determined as of the filing date of the Petition.
>
> I do not question that she made that [assertion] in good faith and based upon her reading of the law. However, that is not a correct reading of the law.
>
> The Jury's determination whether the Bureau of Milwaukee Child Welfare made a reasonable effort to provide the services ordered by the Court to assist the parents in meeting the conditions of safe return, is to be determined as of today's date, and you may consider all evidence relevant to that issue, including evidence of conduct occurring since the filing of the petition.

The guardian *ad litem* then continued her summation to the jury.

¶6 Stacee P. argues that WIS. STAT. § 48.31(1), which defines "'fact-finding hearing'" as, *inter alia*, "a hearing to determine if the allegations in a petition … to terminate parental rights are proved by clear and convincing evidence[,]" means that the petition's date of filing is the cutoff date for the agency to make the requisite "reasonable effort." We disagree because, as the trial

court recognized, the agency's duty to help the parent continues past the petition's filing date.

¶7 The pertinent part of the petition alleges:

> The dispositional order, surpra, contained various conditions of return of these children to the home of [Stacee P.] toward which end the [agency] has made reasonable efforts to provide appropriate services to [Stacee P.]. Yet, [Stacee P.] has failed to meet the conditions established for the return of Enisha, Equon, and Elijah to her home."

The petition also alleged, consistent with WIS. STAT. § 48.415(2)(a)3., that:

> As a consequence of the length of time which has passed since Enisha, Equon, and Elijah were removed from [Stacee P.]'s care (that is, over two years and six months ago) and [Stacee P.]'s substantial non-compliance with the court-ordered conditions of return, including most seriously, [Stacee P.]'s inability to demonstrate that she can yet properly care for and supervise her three said children on an extended or full-time basis, your Petitioner believes that it is substantially unlikely that [Stacee P.] will meet the conditions of the return of the three said children, Enisha, Equon, and Elijah, in the next nine months.

The petition also averred that: "If this matter is litigated, your Petitioner gives notice that all relevant and admissible evidence available to prove this cause of action will be introduced, whether or not it appears on the face of this Petition."

¶8 Stacee P.'s contention that the proof of "reasonable effort" are limited to activities antedating the petition is belied by the statute, which as we have seen, asks the jury to determine for two time periods a parent's compliance with the court-ordered conditions: (1) the time before the petition's filing date, and (2) the nine-month period following the trial. WIS. STAT. § 48.415(2)(a)3.

Thus, as we have seen and as the trial court pointed out, whether the agency has, since the petition's filing, continued to help the parent to meet the conditions of return is a factor that the jury must consider. Although Stacee P. is correct that the jury would not reach the post-trial nine-month period unless the jury first determined that (1) the parent did not, as the petition alleged, satisfy the conditions of return before the petition to terminate the parent's parental rights was filed, and, concomitantly, (2) the agency fulfilled its "reasonable effort" mandate as to that matter, she does not, as we have already noted, tell us how or why evidence of the agency's pre-petition activities did not satisfy the agency's pre-petition "reasonable effort" obligation. *See* ***A.O. Smith Corp. v. Allstate Ins. Companies***, 222 Wis. 2d 475, 491–492, 588 N.W.2d 285, 292 (Ct. App. 1998) (matters not argued in an appellate brief are abandoned).

¶9 Further, the rules of civil procedure govern termination-of-parental-rights proceedings, ***Door County Department of Health & Family Services v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167, 170 (Ct. App. 1999), and *if* Stacee P. believed that evidence of the agency's "reasonable effort" was such that she could not be faulted for her pre-petition failure to meet the conditions of return, she should have either moved for a directed verdict or for a new trial. *See* WIS. STAT. RULES 805.14(4) ("In trials to the jury, at the close of all evidence, any party may challenge the sufficiency of the evidence as a matter of law by moving for directed verdict or dismissal or by moving the court to find as a matter of law upon any claim or defense or upon any element or ground thereof."); 805.15(1) ("A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or

because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice."). She did not, and thus forfeited the right to challenge now the sufficiency of the evidence of the agency's pre-petition efforts. *See* ***Kubichek v. Kotecki,*** 2011 WI App 32, ¶23, 332 Wis. 2d 522, 542, 796 N.W.2d 858, 868; ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 417, 405 N.W.2d 354, 362 (Ct. App. 1987).

¶10 Stacee P. also asks us to exercise our discretionary power of reversal under WIS. STAT. § 752.35 because, she argues, the "real controversy has not been fully tried" because the trial court prevented "trial counsel and the guardian ad litem" from arguing that the State had to prove that the agency fulfilled its "reasonable effort" responsibilities before the petition was filed.[1] This is but a rehash of her main argument, and is thus without merit for the reasons already set out. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758, 765–766 (Ct. App. 1992).

[1] WISCONSIN STAT. § 752.35 provides:

> In an appeal to the court of appeals, if 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 court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

¶11 We affirm the orders terminating Stacee P.'s parental rights to Enisha, Equon, and Elijah.

Elbert H.'s Appeal

I.

¶12 The State alleged that termination of Elbert H.'s parental rights to the children was warranted under WIS. STAT. §§ 48.415(1)(a)2., & 48.415(2). We have already set out in connection with Stacee P.'s appeal what the State had to prove in order to satisfy its burden under § 48.415(2). Section 48.415(1)(a)2. says that termination of a person's parental rights may be justified if the State proves, as material, "[t]hat the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356(2) … and the parent has failed to visit or communicate with the child for a period of 3 months or longer." WISCONSIN STAT. § 48.356(2) requires, by its reference to § 48.356(1), that any "written order which places a child … outside the home" must "inform the parent or parents … of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home or for the parent to be granted visitation."

¶13 Elbert H. testified at the trial that although he was at Equon's birth, he was incarcerated when both Elijah and Enisha were born. He also testified that he knew very little about them: whether they had any special needs, their physician's name, where they went to school or daycare, their favorite food, things that they like to do, or whether they were "involved in therapy" at the time of the

trial. He also told the jury, that he last gave them anything—"Christmas gifts"—in "December of 2008," and that the last time he "provided for their shelter" was in "2006." He also admitted:

- being convicted for: possessing cocaine with intent to deliver, and obstructing an officer, in 1995; theft from a person in 1997; second-degree sexual assault of a child, in 1998; resisting an officer, in 2000; possessing cocaine with intent to deliver, in 2004; possessing marijuana as a second or subsequent crime, in 2005; escape, in 2006, and violation of the duty to register as a sex offender, in 2007;
- never successfully completing probation;
- being in "Abscounder [*sic*] Status from the Department of Corrections" from February of 2007 until February of 2009 because of "just a conflict with me and my Probation Officer."

Incarcerated at the time of the trial, Elbert H. was scheduled to be released on extended supervision in August of 2012. The jury found that the State had proven grounds to terminate Elbert H.'s parental rights to the children under both Sections 48.415(1)(a)2. and 48.415(2).

II.

¶14 Elbert H. claims that the trial court should not have let the jury know about his "criminal history in its entirety." He also argues that the trial court

should not have answered several of the special-verdict questions. We look at each contention in turn.

1. *Criminal history*.

¶15 As Elbert H. recognizes, decisions to admit or exclude evidence are largely within the trial court's discretion. *See* ***State v. Quinsanna D.***, 2002 WI App 318, ¶19, 259 Wis. 2d 429, 443–444, 655 N.W.2d 752, 759. WISCONSIN STAT. RULE 904.01 is a broad gate through which evidence flows: "'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." The trial court ruled that Elbert H.'s criminal history was relevant to whether Elbert H. had met the court-ordered conditions for return of the children, and, if not, whether he would be able to meet those conditions during the nine-month period following the trial. We agree.

¶16 As the trial court pointed out, things that Elbert H. did and the way that he lived are highly relevant to his ability and willingness to properly care for the children. *See* ***La Crosse County Department of Human Services v. Tara P.***, 2002 WI App 84, ¶13, 252 Wis. 2d 179, 187, 643 N.W.2d 194, 198 ("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."). Thus, Shakespeare observed, the past is often prologue. *The Tempest*, Act II, sc. I. The trial court did not erroneously exercise its discretion in permitting the jury to see how Elbert H. lived his life and how that affected where he placed his

children on the spectrum of what he deemed important and where he would likely place them in the future.

2. *Answer to special-verdict questions.*

¶17 Elbert H. also claims that the trial court should not have in essence granted a directed verdict as to whether the children were, as recited by the verdict-form questions that the trial court answered "yes.": (1) "adjudged to be in need of protection or services and placed outside the 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 by law" and (2) "placed, or continued in a placement, outside the Elbert H[.] home pursuant to a court order which contained the termination of parental rights notice required by law." The law, however, permits directed verdicts in termination-of-parental-rights cases, thus taking issues from the jury and depriving a parent of a jury trial on those issues, when there is no dispute about the evidence. *See* ***Scott S.***, 230 Wis. 2d at 465, 602 N.W.2d at 170. Further, a court may take judicial notice of its own records. WIS. STAT. RULE 902.01. *See* ***Teacher Retirement System of Texas v. Badger XVI Limited Partnership***, 205 Wis. 2d 532, 540 n.3, 556 N.W.2d 415, 418 n.3 (Ct. App. 1996) (court files are subject to judicial notice). Elbert H. did not and does not on appeal challenge the accuracy of the orders underlying the trial court's answers. This, of course, is what makes this case different than ***Manitowoc County Human Services Department v. Allen***, 2008 WI App 137, 314 Wis. 2d 100, 757 N.W.2d 842, upon which Elbert H. relies. *See* ***id.***, 2008 WI App 137, ¶2, 314 Wis. 2d at 102–103, 757 N.W.2d at 844 (Trial court may not answer

a jury-verdict question on an element based only on a lawyer's stipulation unless the client agrees, and although "the element in consideration is a 'paper' element, the required documentary evidence is missing from the record, and the evidence adduced is not so 'ample' as to make the element 'undisputed and undisputable.'"). There was no error.

¶18 We affirm the orders terminating Elbert H.'s parental rights to Enisha, Equon, and Elijah.

By the Court.—Orders affirmed.

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