COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0206

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF CHRISTINA MARIE F., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

PATRICIA MARIE F-K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed.*

WEDEMEYER, P.J.[1] Patricia Marie F-K. appeals from an order terminating her parental rights to Christina Marie F., born August 25, 1995. She

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

argues that: (1) it was not in Christina's best interests to terminate her parental rights when the parental rights of Christina's father were not also being terminated; and (2) the trial court erred in admitting certain "other acts" evidence. Because the trial court did not erroneously exercise its discretion in terminating Patricia's parental rights or in admitting the challenged evidence, this court affirms.

BACKGROUND

On July 24, 1997, the State filed a petition to terminate the parental rights of Patricia and Jesse F., the father, to the child, Christina. Christina had been placed outside the home of Patricia since birth. The petition alleged that Patricia had failed to assume parental responsibility as defined in § 48.415(6), STATS., and that grounds existed to terminate parental rights because Christina remained in continuing need of protection or services. The petition specifically alleged:

> 1. Patricia K. has a history of protective services referrals dating back to October 1980, regarding neglect, poor hygiene, and poor housekeeping, which referrals have caused the MCDHS to remove her children from her care. Numerous referrals for social services have been made to assist Patricia K. in these areas; despite these referrals, there has been little evidence of improvement or change in housekeeping, hygiene, and the care and supervision of Ms. K.'s children.
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> 2. Patricia K. has attended parenting classes as required under the dispositional order, but she has failed to demonstrate retention of the principles of child care taught in these parenting classes.
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> 3. Patricia K. has failed to maintain a residence in a safe and sanitary condition.
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> 4. Patricia K. has failed to demonstrate that she is able to provide competent supervision of her children when they are visiting with her or in her care.

> 5. Patricia K. has failed to demonstrate an ability to properly care for her children, or other children who have been residing with her. For example, in February 1994, Ms. K. was present when an adult male, Michael N., encouraged her then 10-year old daughter, Tasha K., to suck on the penis of the family dog. [Michael N.] offered the child $1.00 to engage in this sexual act with an animal; Patricia K. was present when this incident occurred, along with other family members. The persons present thought this sexual act between a 10 year old child and a dog was funny, and laughed at the incident. The police were not notified about this incident until James K. reported the incident to the police after 2 months had passed.
>
> 6. Patricia K. has failed to successfully complete counselling [sic] to address the issues raised by Dr. Burton Silberglitt in his 1994 psychological evaluation.

A jury trial on the petition was commenced on June 25, 1998. The jury found that Patricia failed to have a substantial parental relationship with Christina, that Christina was placed outside the home for one year or more as a child in need of protection or services, that the dispositional order placing Christina outside the home contained written warnings regarding termination of parental rights, that the Department of Human Services made a diligent effort to provide services to Patricia, that Patricia failed to demonstrate substantial progress toward meeting the conditions for return of Christina, and that there is no substantial likelihood that Patricia will meet the conditions within the next twelve months. The jury also found that Jesse had not failed to have a substantial parental relationship with Christina.

At the dispositional hearing on July 31, 1998, the trial court terminated Patricia's parental rights on the grounds that she had failed to assume parental responsibility for Christina. The trial court found that it was in the best interests of Christina to terminate Patricia's parental rights. An order to this effect was entered. Patricia now appeals.

DISCUSSION

A. Termination of Parental Rights.

Patricia claims that it was not in the best interests of Christina to terminate Patricia's parental rights when Jesse's parental rights were not also being terminated. This court rejects her argument. In reviewing a trial court determination of the best interests of the child under § 48.426, STATS., this court applies the erroneous exercise of discretion standard. *See* ***In the Interest of Brandon S.S.***, 179 Wis.2d 114, 150, 507 N.W.2d 94, 107 (1993). This court will not find an erroneous exercise of discretion where the record shows "that the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis.2d 400, 415, 320 N.W.2d 175, 184 (1982). The record demonstrates a proper exercise of discretion.

Section 48.426(3), STATS., sets forth the factors to consider in the termination decision. This section provides:

> **(3)** FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
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> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
>
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.

> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

It is clear from this court's review of the record that the trial court considered each of these factors. Patricia's argument focuses on the first factor—the likelihood of adoption. Patricia argues that because the father's rights were not also being terminated, the adoption factor consideration somehow required the court to not terminate her parental rights. This court cannot agree.

The trial court specifically addressed the adoption factor. It stated in pertinent part:

> [O]ne of [the factors to be considered] after a TPR [is the likelihood of a child's adoption]. And, of course, that is not applicable here because an immediate adoption is not available in that the father's rights are not going to be terminated.
>
> ….
>
> So we have two likelihoods, essentially, and I think a lot of attention should be drawn to that. You have the caseworker that testified that there is a plan … if the father could not meet conditions then that [TPR] would be a possibility and serve the child's best interests.
>
> But also that this father may vary [sic] well represent as the biological father a very real possible placement. It may vary [sic] well turn out that this father will step up to the plate and do everything possible to see to it that this child is cared for, and visit the child, and may very well be a proper and fit parent to take care of this child.
>
> So those are the two possibilities that I see.

Under the circumstances presented in this case, the trial court's decision was reasonable. Here, Patricia had been afforded ample opportunity to comply with the conditions required by the dispositional order. She failed to do so. Jesse had not been afforded a similar opportunity, due in part to the fact that it was not adjudicated until October 22, 1997, that he was Christina's father.

The record is replete with evidence of Patricia's inability to parent adequately. This court need not recite this evidence here. It is abundantly clear that the trial court's decision to terminate Patricia's parental rights was in the best interests of Christina and did not constitute an erroneous exercise of discretion. There was no reason to preserve Patricia's parental rights to see what happens with Jesse's parental rights. The case law Patricia relies on for such an assertion is inapposite as these cases address a situation where the parent was voluntarily seeking termination to avoid financial or emotional consequences, and where the guardian ad litem was opposed to terminating the parental rights. *See, e.g.,* ***In Interest of A.B.***, 151 Wis.2d 312, 321-22, 444 N.W.2d 415, 419 (Ct. App. 1989). Such is not the case here.

As noted, the trial court considered the appropriate factors as pertinent to the facts presented in the instant case and reached a reasonable conclusion. Therefore, there was no erroneous exercise of discretion in terminating Patricia's parental rights.

B. Evidentiary Admissions.

Patricia also argues that the trial court erroneously exercised its discretion when it admitted evidence of "prior poor parenting on the part of Patricia." Specifically, Patricia argues that the admission of this evidence, which included testimony regarding "nearly twenty years" of poor parenting and the "dog incident" referred to above was contrary to § 904.04, STATS. This court rejects her argument.

Rulings on the admission or exclusion of evidence are discretionary determinations for the trial court. *See* Chapter 904, STATS., and ***Lievrouw v. Roth***, 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990). This court will not

reverse a discretionary determination unless it constitutes an erroneous exercise of discretion. *See* ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis.2d 400, 423, 491 N.W.2d 484, 493 (1992). If the trial court examined the relevant facts, applied the appropriate law and reached a reasonable decision, this court must sustain the discretionary decision. *See* ***Loy***, 107 Wis.2d at 414-15, 320 N.W.2d at 184. This court concludes that the trial court's decision to admit the challenged evidence did not constitute an erroneous exercise of discretion.

The challenged evidence was directly relevant to the issue of the existence of a substantial likelihood that Patricia would not meet the conditions for return. Section 904.04, STATS.,[2] does not apply to this case because the evidence

[2] Section 904.04, STATS., provides:

> **(1)** CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> (a) *Character of accused.* Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;
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> (b) *Character of victim.* Except as provided in s. 972.11(2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
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> (c) *Character of witness.* Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.
>
> **(2)** OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

was not used to prove that "the person *acted* in conformity therewith." ***Id.*** (Emphasis added).

The challenged evidence was not used to show that Patricia *acted* in conformity with her past poor parenting decisions. Rather, the evidence was used to show that Patricia would not be able to parent Christina properly because she would not be able to comply with the conditions required by the dispositional order. As noted by the guardian ad litem in his brief to this court, § 48.415(2)(a)3, STATS.,[3] by its very nature, calls for character evidence. The statute requires that the fact finder predict how the parent will act in the future. Therefore, the plain language of § 904.04(2), STATS., does not apply under the facts presented here.[4]

By the Court.—Order affirmed.

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

[3] Section 48.415(2)(a)3, STATS., provides:

> **(2)** CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:
>
> (a) … 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that 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 12-month period following the fact-finding hearing under s. 48.424.

[4] Based on the resolution reached on this issue, this court declines to address the debate presented in the briefs as to whether § 904.04(2), STATS., is ever applicable to termination of parental rights cases.