COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

Nos. 00-0213
00-0214
00-0215
00-0216

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

NO. 00-0213

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MARY H.,

RESPONDENT-APPELLANT.

NO. 00-0214

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MARY H.,

RESPONDENT-APPELLANT.

NO. 00-0215

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MARY H.,

RESPONDENT-APPELLANT.

NO. 00-0216

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MARY H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Mary H. appeals from an order granting termination of parental rights (TPR) petitions to her four children, Holli H., Meshelle H., Timithy H. and Juston H. She argues that the circuit court erroneously exercised its discretion by finding her to be an unfit parent and by failing to properly consider the best interests of the child factors of WIS. STAT. § 48.426(3). Additionally, she claims that the Walworth County Department of Health and Human Services (DHHS) did not diligently provide her with assistance to meet the conditions for her children's return. She also asserts that her trial counsel was ineffective for failing to object to opinion testimony from nonexpert witnesses. Lastly, she contends that the fact finder should have considered her financial inability to meet the return conditions. We disagree with these arguments and affirm.

¶2 Mary and her husband, Donald H., were both served with TPR petitions to their four children; however, after the fact-finding hearing, the jury determined that only Mary had not demonstrated substantial progress toward meeting the conditions for her children's return and that the grounds for termination had been proven. The court subsequently found Mary unfit, determined that termination of her parental rights was in the children's best interests and issued the TPR order. Mary appeals. Before Mary filed her appeal, Donald voluntarily terminated his parental rights.[2]

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] We are reconsidering the issues presented today after withdrawing a previous opinion in which we reversed the TPR order against Mary. We reached that decision because we concluded that in this case terminating only one parent's rights to her children did not effectuate the children's best interests. This is Mary's chief argument on appeal.

(continued)

Donald's voluntary termination of his parental rights was ordered on January 11, 2000. Mary, through her counsel, Lynn Ellen Hackbarth, filed a notice of appeal from the TPR order against her on January 17, 2000. She later filed her brief, arguing that "even though Mary H.'s rights were terminated, Don H., her husband in an intact marriage, still retains his parental rights. There is absolutely no chance at this point that these children will be able to be adopted while Don still retains his rights." Clearly, this statement was not true when the brief was filed on February 24, 2000. A lawyer shall not knowingly "make a false statement of fact or law to a tribunal." SCR 20:3.3(a)(1) (1999). Filing a defective brief with this court can be grounds for sanctions against counsel, *see* 5 AM. JUR. 2D *Appellate Review* § 949 (1995); here, we give Hackbarth the benefit of the doubt that the error in the brief was made in good faith.

However, as the months went by, none of the parties to this appeal corrected the error and informed the court that Mary's primary argument was now moot. For example, the March 6, 2000 brief filed by the Walworth County Corporation Counsel, Gary Rehfeldt, and adopted by reference by the guardian ad litem, Carol Unger-Keizer, failed to note that Donald's rights had been terminated even though guardian ad litem Unger-Keizer appeared on the children's behalf at Donald's TPR hearing. One has to wonder how carefully Unger-Keizer reviewed Mary's brief.

A March 14, 2000 reply brief was filed by Hackbarth, which maintained the argument that Donald still retained his parental rights. On April 12, 2000, we released our decision in this case. Although this release date was over four months after Donald voluntarily terminated his parental rights, the appellate record was never updated with this information, and we resolved the appeal by relying in large part on this erroneous fact.

We have great difficulty imagining how none of the parties to this case realized that this court should be notified that Donald's parental rights were terminated. It is extremely difficult to fathom how Unger-Keizer failed to realize this discrepancy particularly because, unlike any of the other attorneys in this case, she was a counsel of record at Donald's TPR hearing. To make it crystal clear what the proper attorney conduct should have been, counsel should have moved the court to supplement the record with the updated information. Because we were not made aware of this information until Rehfeldt filed a motion for reconsideration after our decision was released, we had to expend our judicial resources on this matter twice.

BACKGROUND

¶3 The jury was presented with the following evidence at the fact-finding hearing. Mary and Donald have been together for ten years. Neither parent has a drug or alcohol problem. At the time of the hearing, Donald was working full time for a waste management company and earning his highest salary ever. He also delivered newspapers for extra income. From 1995 to 1998, Donald's employment fluctuated, and although he was not always working full time, he was never unemployed for more than a week. Mary drove a bus and was the primary care giver for the children. She also suffers from attention deficit hyperactivity disorder (ADHD), a condition for which she takes the appropriate medication. Mary and Donald have struggled to maintain stable housing and for a time were forced to live in a camper. They also deal with financial difficulties and owe over $25,000 for medical expenses resulting from Mary's pregnancies.

¶4 DHHS has been providing foster care and related services to Mary's four children. The two eldest children, Holli and Juston, were first placed in foster care by Marquette county because of neglect in September 1993. Holli was thirteen months old and Juston was one month old. Timithy was first taken into foster care at birth in August 1994. The children were eventually returned to live with Mary, and the youngest child, Meshelle, was born in August 1996. In April 1997, all of the children were removed from the home because of an instance of child abuse when Mary hit Holli on the back hard enough to leave bruises. Formal charges were not brought against Mary. As a result of the time spent in foster

care, the children have lived out of the home longer than they have lived with their birth parents.[3]

¶5 After the children were taken from the home in April 1997, Mary and Donald were notified of the conditions necessary for the children's return. Some of these return conditions were to (1) maintain safety standards in the home; (2) establish a daily routine for meal, bed and bath times; (3) plan age-appropriate activities with the children; (4) maintain stable housing for three months, while keeping current with rent and utilities; and (5) increase involvement with the children through doctor appointments and parent/teacher conferences. To help Mary and Donald meet these conditions, DHHS supplied the following services:

> We've provided foster care, … in-home parenting [skills], supervised visitation, psychological evaluation for Mary, we provided her with her first prescription for her medication, … budgeting services, resource services to … the Womens, Infants, and Children Program, referred her to public health, … the Healthy Start Program, … we referred her for food stamps, … we … suggested … counseling … [and] two of the children have had individual therapy.

¶6 County social workers assisted Mary and Donald to develop plans to meet the return conditions. Visiting social workers described Mary and Donald's home as being dirty and difficult to walk through because of clutter, having spoilt food in the refrigerator and smelling like pet feces and urine. Once Mary and Donald demonstrated that their home was appropriately safe and clean, they were allowed to visit with their children at home. The social workers would check to

[3] Each child has lived in foster care longer than he or she has lived with his or her parents: Holli, age seven, in foster care for four years; Juston, age six, in foster care for four years; Timithy, age five, in foster care for three years and six months; and Meshelle, age three, in foster care for two years and three months.

verify that Mary and Donald were maintaining the safety standards before home visits. Home visits were stopped several times but would resume when Mary and Donald could demonstrate compliance with the safety standards. Visits were stopped because "the kids were returning from their visits … with wet diapers … smell[ing] like urine," "one time Timmy … had vomit all over his clothing" and another time "Juston was bit by the dog."

¶7 In support of its contention that Mary and Donald failed to meet the other return conditions and that they would be unable to do so within the next twelve months, the county presented evidence showing that the couple continued to lack financial stability. It was shown that Mary and Donald had moved five times, were evicted once, fell behind on rent and utilities and could not keep telephone service. The jury resolved that the county had proven through the evidence that grounds existed to terminate Mary's parental rights but not Donald's.

¶8 At the dispositional hearing, the court heard arguments from all parties about whether it should grant the TPR petitions. Acknowledging that it was "moved both ways," the court concluded that although both parents really loved their children, they were unable to grasp how to care for them. The court determined that "there's a good chance" that Donald's parental rights would eventually be terminated and granted the TPR petitions against Mary. As we previously mentioned, Donald subsequently voluntarily terminated his parental rights.

DISCUSSION

A. Circuit Court's Exercise of Discretion

¶9 The procedure in Wisconsin for involuntarily terminating a parent's rights to his or her child is threefold: the statutory grounds in WIS. STAT. § 48.415 must be satisfied; except in unusual circumstances, the parent must be found unfit, *see* ***Mrs. R. v. Mr. and Mrs. B.***, 102 Wis. 2d 118, 136, 306 N.W.2d 46 (1981); and the termination must be in the child's best interests, *see* WIS. STAT. § 48.426(2). After a finding that grounds for a termination of parental rights exist, a circuit court's decision to grant the termination is an exercise of discretion. *See* ***B.L.J. v. Polk County Dep't of Soc. Servs.***, 163 Wis. 2d 90, 104, 470 N.W.2d 914 (1991). We will uphold the court's discretionary decision if the record demonstrates that the court has examined the relevant facts, applied a proper standard of law and employed a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See* ***Weidner v. W.G.N.***, 131 Wis. 2d 301, 315, 388 N.W.2d 615 (1986).

¶10 After it has been determined that grounds for the TPR exist, the circuit court must determine a final disposition for the child or children. *See* WIS. STAT. § 48.427. Options available to the court include dismissing the petition "if it finds that the evidence does not warrant the termination of parental rights," § 48.427(2), or entering an order terminating parental rights, *see* § 48.427(3). The standard to be applied in making this determination is that "[t]he best interests of the child shall be the prevailing factor considered by the court." WIS. STAT. § 48.426(2). Section 48.426(3) details the factors to be considered for determining the best interests of the child as the following:

> (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.

¶11 Mary contends that the circuit court's decision that she was an unfit parent is erroneous because the county did not show egregious behavior on her part. She also disputes the court's evaluation of the children's best interests.

¶12 In order to properly review the court's exercise of discretion, we have read the transcript of the dispositional hearing and reviewed the exhibits presented for the court's consideration. We have also reviewed the transcripts of the court proceedings prior to the disposition, the pleadings and other matters set forth in the record. Consequently, we conclude that the circuit court examined the relevant facts, applied the proper standard of law, and set forth its reasoning process on the record, concluding that a termination was in the best interests of the children, a conclusion that a reasonable judge could reach. The circuit court's order terminating Mary's rights was thus a proper exercise of discretion. *See* ***Weidner***, 131 Wis. 2d at 315.

¶13 There was evidence in the record in the county's dispositional report indicating that adoptive parents were waiting for all the children. The county's report, as well as testimony at the hearing, provided the court with ample information regarding the ages and health of each of the children and the present status of relationships between the children and their parents. The children's wishes were unknown because of their young ages. The court specifically noted these factors, as well as the fact that the children had presently been separated from their mother for two years and four months, resulting in the children being in foster care longer than they had been in their mother's care. The court also foreshadowed that Donald's parental rights would eventually be terminated; thus, the children would be able to enter into more stable and permanent family relationships if a termination were granted.

¶14 Supporting its determination that Mary was an unfit parent, the court indicated that she was emotionally a child, lacked motivation and follow through, and although she loved her children, she was devoid of parental instincts. To reach this conclusion, the court evaluated the quantity, quality, and persuasiveness of the evidence. This court concurs that the evidence supports the court's termination of Mary's parental rights because she was unfit and it served the children's best interests.

B. Diligent Effort to Provide Services

¶15 Mary argues that DHHS did not make a diligent effort to provide her with the necessary services to enable her to meet the conditions for her children's return. She specifically points to the fact that because she has ADHD and was depressed, the social workers assisting her should have devised more appropriate teaching methods.

¶16 At the TPR proceedings, the jury was asked on its special verdict form whether DHHS made a diligent effort to provide the services ordered by the court as required by WIS. STAT. § 48.415(2)(a)2.b. The jury found that diligent efforts to provide court-ordered services had been made. We will uphold the jury's finding that DHHS made a diligent effort to provide services ordered by the court if it is supported by credible evidence. *See* ***Foseid v. State Bank***, 197 Wis. 2d 772, 782, 541 N.W.2d 203 (Ct. App. 1995).

¶17 The jury heard testimony from county social workers providing assistance to Mary that they were aware that she suffered from ADHD and that this could be a barrier to her therapy. The social workers testified that they tried to follow up visits by putting into writing their suggestions for improvements that Mary could make so that she could have concrete examples for future reference. Another tool they specifically used to tailor their services to Mary's needs was the notebook. They encouraged Mary to keep a notebook where she could list the activities she did with her children during her visits and other goals she planned to accomplish. The social workers' testimony provided credible evidence upon which a reasonable jury could find that DHHS made a diligent effort to provide the services ordered by the court. Because the jury's finding is supported by credible evidence, we uphold the circuit court's order.

C. Ineffective Assistance of Counsel

¶18 Mary contends that she was denied effective assistance of counsel because her trial counsel failed to object to opinion testimony from nonexpert witnesses. She claims that the county attorney asked two social worker witnesses whether they believed to a reasonable degree of professional certainty that Mary and Donald had failed to meet the return conditions and if Mary and Donald would

be able to do so in the next twelve months. These witnesses were not qualified as experts, Mary asserts, and could not give opinion testimony. She insists that her trial counsel should have made the appropriate objections.

¶19 To evaluate the effectiveness of trial counsel in a TPR proceeding, the two-part ***Strickland v. Washington***, 466 U.S. 668 (1984), test is applied. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992). This test requires that Mary show that her trial counsel's performance was deficient and that it prejudiced her defense. *See* ***id.***

¶20 In general, only expert witnesses with "knowledge, skill, experience, training, or education" may testify in the form of an opinion. WIS. STAT. § 907.02. This includes opinion testimony regarding the ultimate issue to be decided. *See* WIS. STAT. § 907.04.

¶21 The county argues that both social workers testified about their education, training and experience and met the standards to qualify as experts. We agree. Mary overlooks ***State v. Hollingsworth***, 160 Wis. 2d 883, 896-97, 467 N.W.2d 555 (Ct. App. 1991), where we determined that a social worker was qualified to give expert testimony about his client's parenting skills based on his experience in the field. Here, the witnesses testified to having achieved their specialized knowledge through more avenues than just experience. We conclude that the witnesses were qualified to present their opinions. Trial counsel's performance was not deficient.

D. Financial Inability to Meet Return Conditions

¶22 The purpose for enacting the Children's Code is described in part as: "To insure that children are protected against the harmful effects resulting from

the absence of parents … from the inability, other than financial inability, of parents … to provide for care and protection for their children ….” WIS. STAT. § 48.01(1)(bg)1. Mary argues that because of this language, the court should have considered that she was financially unable to meet the return conditions. The county responds that this issue has been waived. We agree that Mary raised this issue for the first time on appeal, and therefore it is dismissed. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

CONCLUSION

¶23 In summary, we hold that the TPR order was not issued erroneously. We determine that the circuit court properly reached a reasoned decision that Mary was an unfit parent and that the children’s best interests required termination. Also, we uphold the jury’s finding that DHHS made diligent efforts to provide services to help Mary meet the return conditions. We further hold that Mary’s trial counsel was not ineffective and, finally, that she waived her argument regarding her financial inability to meet the return conditions. Therefore, we affirm the order.

By the Court.—Order affirmed.

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