COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2013

Diane M. Fremgen
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. 2013AP2250 **Cir. Ct. No. 2012TP9**

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

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

BARRON COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TARA H.,

RESPONDENT-APPELLANT,

ROBERT S.,

RESPONDENT.

APPEAL from an order of the circuit court for Barron County: JAMES D. BABBITT, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Tara H. appeals an order terminating her parental rights to her son, Jeramiha H. Tara argues the circuit court erred at the dispositional hearing by failing to consider Jeramiha's present circumstances. We affirm.

BACKGROUND

¶2 This case is before us a second time. Jeramiha was born to Tara and Robert S. on May 5, 2008.[2] On February 17, 2012, the Barron County Department of Human Services petitioned to terminate Tara's parental rights to Jeramiha. The petition alleged Tara had failed to assume parental responsibility. Tara contested the petition, and a jury found she failed to assume parental responsibility of Jeramiha. Based on the jury's determination, the court found Tara was an unfit parent and scheduled a dispositional hearing.

¶3 At the dispositional hearing, the circuit court noted it was required to determine whether it would be in Jeramiha's best interests to terminate Tara's parental rights. To make that decision, the circuit court observed it needed to consider the six factors enumerated in WIS. STAT. § 48.426(3). Specifically, the court was required to consider:

> (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.

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Robert is not subject to this appeal.

> (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.

WIS. STAT. § 48.426(3)(a)-(f). The court proceeded to weigh each factor and ultimately concluded it was in Jeramiha's best interests to terminate Tara's parental rights.

¶4 Tara appealed. ***Barron Cnty. DHHS v. Tara H.***, No. 2012AP2390, unpublished slip op. (WI App Jan. 15, 2013). She argued the circuit court erroneously exercised its discretion at the dispositional hearing by failing to adequately consider the WIS. STAT. § 48.426(3)(c) factor. ***Id.***, ¶14. She emphasized the court's consideration of that factor consisted of nothing more than its belief that the evidence supported the jury's verdict that she failed to assume parental responsibility of Jeramiha. ***Id.*** She contended the failure to assume parental responsibility ground and the § 48.426(3)(c) factor were not synonymous, and, irrespective of whether the jury determined she failed to assume parental responsibility, the court still needed, but failed, to consider Jeramiha's relationships with her and her family and whether severing those relationships would be harmful to Jeramiha. ***Id.***

¶5 We agreed and concluded the circuit court erred by failing to consider whether Jeramiha had a substantial relationship with Tara or other family members and whether it would be harmful to Jeramiha to sever those

relationships. ***Id.***, ¶¶16, 18. We then declined the County's request to conclude that, despite the error, termination of Tara's parental rights was in Jeramiha's best interests based on the record. ***Id.***, ¶19. We observed the record showed Tara's mother babysat Jeramiha, Tara's sister supervised Tara's visits with him, and the county social worker stated Jeramiha had a relationship with Tara and was excited to see her during visits. ***Id.***, ¶18. We stated that whether Jeramiha has a substantial relationship with Tara or his birth family members, and whether the severance of those relationships would be harmful to Jeramiha, required factual findings. ***Id.***, ¶21. Citing ***State v. Margaret H.***, 2000 WI 42, ¶38, 234 Wis. 2d 606, 610 N.W.2d 475, we noted our supreme court has "expressed a preference for remanding to the circuit court when confronted with inadequate findings, particularly in family law or domestic relations actions." ***Id.***, ¶20. Accordingly, we reversed and remanded for a new dispositional hearing. We directed the circuit court to consider all of the factors enumerated in WIS. STAT. § 48.426(3), including § 48.426(3)(c). ***Id.***, ¶21. We stated the court need not hear the same evidence again, but it may receive additional facts as necessary. ***Id.***, ¶21 n.4.

¶6 At the start of the dispositional hearing on remand, Tara's trial counsel asked the circuit court about the relevant time period for purposes of determining whether termination of Tara's parental rights was in Jeramiha's best interests. Specifically, Tara's counsel asked the court if the relevant time period ended on the date the jury determined Tara failed to assume parental responsibility of Jeramiha. The court explained the relevant time period extended until the date of the dispositional hearing. However, the court stated it believed it would be "fair" if it did not consider the time period between July 18, 2012, the date of the first dispositional hearing, and June 7, 2013, the date of the current dispositional

hearing. The court reasoned it would not have had the additional time period to consider had it not erred in its previous determination.

¶7 The County objected, and argued the relevant time period extended until "today," or June 7, 2013. It advised the court it had prepared for the hearing from the standpoint that the circuit court would consider the additional time period when determining whether termination was in Jeramiha's best interests. It also emphasized WIS. STAT. § 46.426(3) required the court to consider factors such as Jeramiha's current age and health and the total time Jeramiha has been removed from Tara's home.

¶8 The court then asked Jeramiha's guardian ad litem for her position on the time period. Jeramiha's guardian ad litem took no position. Ultimately, the circuit court ruled the relevant time period would end July 18, 2012.

¶9 After taking additional evidence, the court stated it was relying on the evidence from the jury trial, the dispositional report, and both dispositional hearings. The court then considered and discussed each WIS. STAT. § 48.426(3) factor. The court first found there was a "significant likelihood" that Jeramiha would be adopted if the court terminated Tara's parental rights. The court also found that, when Jeramiha was removed from Tara's care, he was "suffering life

threatening injuries,"[3] but has since "thrived and grown, and from a health standpoint he was in a remarkably better situation."

¶10 The court found the amount of time Jeramiha has been removed from Tara's home—almost half his life—combined with his actions showed that Jeramiha has no bond or substantial relationship with Tara or her family members such that it would be harmful to Jeramiha to sever those relationships. The court explained, "[W]hen it's time to go home, [Jeramiha is] ready to go home …. He does not act out, he does not throw a tantrum, he rarely if ever cries, his wishes are clear by his actions and that … he is viewing people other than his biological family … as … family."

¶11 Finally, the court found

> if [Jeramiha's foster family] prevail[s] in their adoption it will be clearly a marvelous situation for him. He's done well there, he's a member of their family now, and will only continue to thrive in this court's opinion. There is no evidence to the contrary that he will not thrive. Even if he is not adopted by [his foster family], if he's adopted by another family, that still will bring the necessary stability into his life and that all merits in favor of termination.

[3] Jeramiha was removed from Tara's care on August 26, 2010, after she failed to seek medical care for him. On that day, the County responded to Tara's residence after receiving a report that Jeramiha was "bruised from head to toe." When police and a social worker arrived at Tara's residence, the social worker testified Jeramiha was visibly bruised, quivering, and looked lifeless. An ambulance was called and Jeramiha was taken to a local hospital. He was ultimately airlifted to Children's Hospital in Minnesota. Jeramiha suffered serious injuries, including bruising of his brain, his forehead, both ears, the back of his head, his chest, his abdomen, his genitalia, and his legs. He also had two rib fractures, a punctured lung, a lacerated liver, and injury to his kidneys. Doctor Mark Hudson, Jeramiha's treating physician at Children's Hospital, testified he believed Jeramiha had been "beaten severely." There was no allegation that Tara abused Jeramiha. Jeramiha was found to be a child in need of protection or services based on Tara's admission to neglect—that she should have sought medical attention for Jeramiha. Tara also pled guilty to misdemeanor neglect for failing to take Jeramiha to a doctor.

¶12 The court concluded that each WIS. STAT. § 48.426(3) factor weighed in favor of the determination that termination of Tara's parental rights was in Jeramiha's best interests. Accordingly, the court terminated Tara's parental rights. Tara appeals.

DISCUSSION

¶13 Tara argues the circuit court erred by limiting its consideration of Jeramiha's best interests to matters as they stood eleven months earlier at the first dispositional hearing instead of considering his "present circumstances." Tara emphasizes that in both ***Margaret H.***, 234 Wis. 2d 606, ¶39, and ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶43, 255 Wis. 2d 170, 648 N.W.2d 402, our supreme court, when ordering a new dispositional hearing, directed the circuit court to consider the child's "present circumstances." Tara asserts the circuit court's failure to consider the most recent eleven months of Jeramiha's life when weighing the WIS. STAT. § 48.426(3) factors undermines its decision ordering termination. She asks us to reverse and remand for a new dispositional hearing.

¶14 The County agrees with Tara that the circuit court erred by failing to consider Jeramiha's present circumstances at the dispositional hearing. However, the County asserts Tara forfeited her right to object to this error on appeal because Tara failed to object in the circuit court. The County emphasizes it was the only party who objected to the court's error at the June 7, 2013 dispositional hearing. The County also argues the circuit court's error is harmless.

¶15 We first consider whether Tara has forfeited her right to object to the time period considered by the circuit court. Generally, a party must object to an error to preserve the issue for appellate review. ***Door Cnty. DHFS v. Scott S.***, 230 Wis. 2d 460, 466, 602 N.W.2d 167 (Ct. App. 1999).

> The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.

State v. Ndina, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612.

¶16 Tara acknowledges her trial counsel failed to object. She argues counsel was not required to object because the record shows the circuit court made up its mind about the relevant time period and any objection by Tara's counsel would have been futile. We disagree. After the County objected, the court asked the guardian ad litem for further input before making its decision. It is disingenuous for Tara to acquiesce by silence to the error in the circuit court and now argue this error constitutes grounds for reversal. *See* ***id.*** We conclude Tara has forfeited her right to argue on appeal the court erred by failing to consider the proper time period.

¶17 In any event, even if we determined Tara's argument was not forfeited by her counsel's failure to object, we conclude the error is harmless.[4] WISCONSIN STAT. § 805.18(2) provides, in relevant part:

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of ...

[4] We agree with the parties that the court erred by only considering Jeramiha's circumstances as of July 12, 2012, the date of the first dispositional hearing. Both ***State v. Margaret H.***, 2000 WI 42, ¶39, 234 Wis. 2d 606, 610 N.W.2d 475, and ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶43, 255 Wis. 2d 170, 648 N.W.2d 402, establish that a court is required to consider the child's present circumstances at a dispositional hearing. The circuit court in this case should have considered Jeramiha's circumstances as of June 7, 2013, the date of the second dispositional hearing.

> error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

"For an error to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶27, 246 Wis. 2d 1, 629 N.W.2d 768 (citation omitted). "A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome." ***Id.*** (citation omitted). "If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless." ***Id.*** (citation omitted).

¶18 The County argues the court's time period error is harmless because there is no indication in the record that the court excluded any evidence Tara wished to offer. The County emphasizes Tara neither offered any evidence from the additional eleven-month time period nor objected to the time period. The County argues it is speculative to assume Tara had any evidence regarding Jeramiha's best interests that the court failed to consider. The County also argues that, given the circuit court's overwhelming factual findings in support of its decision that termination was in Jeramiha's best interests, there is no possibility that, had the court considered any evidence from the additional eleven-month time period, the result would have been different.

¶19 Tara responds the error is not harmless because "the circuit court's erroneous ruling on the relevant time frame improperly limited the evidence presented." She asserts "[a] remand is needed so that the court can hear evidence about [Jeramiha's] present circumstances."

¶20 Tara's argument, however, assumes there was additional evidence that is sufficient to undermine our confidence in the outcome. We agree with the County that nothing in the record suggests the circuit court improperly limited any evidence Tara wished to offer. Nor does Tara identify any additional evidence she would proffer at a new hearing.

¶21 We also observe the circuit court's factual findings clearly established that each WIS. STAT. § 46.426(3) factor weighed in favor of a determination that it was in Jeramiha's best interests to terminate Tara's parental rights. Consequently, any excluded evidence from the eleven-month period would have needed to sufficiently suggest termination was *not* in Jeramiha's best interests in order to undermine our confidence in the court's decision. As Tara did not object to the time limitation imposed by the court, and only the County wanted the court to consider evidence regarding the additional eleven months, it appears that any additional evidence would have only provided further support for the County's position that termination was in Jeramiha's best interests.

¶22 In short, the court's error regarding the relevant time period does not undermine our confidence in the outcome. There is no indication that any relevant evidence was erroneously excluded. Additionally, the evidence presented and the factual findings made by the circuit court sufficiently support its determination that termination was in Jeramiha's best interests. Because the error does not undermine our confidence in the outcome, we conclude the error is harmless.

By the Court.—Order affirmed.

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