COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2209

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF CRYSTAL M. D., A PERSON UNDER THE AGE OF 18:

APRIL C. H.,

PETITIONER-RESPONDENT,

V.

MARK M. D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Bayfield County: ROBERT E. EATON, Judge. *Affirmed*.

MYSE, J. Mark M. D. appeals an order terminating his parental rights to Crystal M. D. Mark contends that the trial court erred by giving insufficient consideration to his reasons for not maintaining a relationship with Crystal; namely, his incarceration, and the failure of his ex-wife, April C. H., to keep him informed of Crystal's whereabouts. Mark further contends that

termination is improper because he did not receive a written warning in his divorce decree that continued denial of periods of placement may result in termination of parental rights. Finally, Mark asks this court to exercise its discretionary power to reverse, arguing that justice has miscarried. Because this court concludes that the court did not err by terminating Mark's parental rights, Mark waived his improper termination argument by not advancing it to the trial court, and the interests of justice do not require reversal, the order terminating parental rights is affirmed.

April and Mark were married in early 1986, and their daughter Crystal was born to them later that year. The marriage ended in divorce in April 1991. The divorce judgment excluded physical placement with Mark, based upon the court's finding that it "would endanger [Crystal's] emotional health."

April later remarried, and Crystal developed a close relationship with her stepfather and his family. Her stepfather wishes to adopt Crystal, and therefore these proceedings were brought to terminate Mark's parental rights.

For much of the time prior to and following the divorce judgment, except for a thirteen- to fourteen-month period in 1993 and 1994, Mark was incarcerated in the state correctional system. Mark did not attempt to modify the divorce judgment to permit some form of limited physical placement with Crystal, either during his confinement or following his release. Mark contends that he did not do so because he was unable to locate Crystal's whereabouts, and his probation officer told him that he could not. The trial court, however, found that Mark either knew or easily could have determined Crystal's whereabouts, and that his testimony about the probation officer was "incredible."

Mark also contends that he sent hundreds of letters and several gifts to Crystal; that during the marriage he had assumed responsibility for child care, housekeeping, and food preparation; and that he had a healthy and normal relationship with Crystal. April, on the other hand, testified that he assumed none of the parenting responsibilities, and that Crystal was fearful of him because he was abusive. The trial court accepted that Mark was a loving father, and did participate as a caregiver during the early years of Crystal's life. The court concluded, however, that while Mark may have talked about making sacrifices for Crystal, his actions in not staying crime-free and out of prison "have spoken louder than his words on that topic." Based on this, the close relationship that has developed between Crystal and her stepfather, and the strong likelihood that her stepfather would adopt her, the court determined that it was in Crystal's best interests to terminate Mark's parental rights. Mark appeals this order.

In asking this court to reverse the order, Mark faces a difficult task. The ultimate decision to terminate parental rights is a discretionary one for the trial court. ***In re Michael I.O.***, 203 Wis.2d 148, 152, 551 N.W.2d 855, 857 (Ct. App. 1996). The trial court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion a reasonable judge could reach. ***Id***. On appeal, this court must accept the trial court's findings of fact unless they are clearly erroneous. ***Id***. at 152-53, 551 N.W.2d at 857.

Mark challenges the trial court's finding under § 48.426, STATS., that termination of his parental rights is in Crystal's best interests. Mark claims that the trial court erred by not giving adequate consideration to the circumstances surrounding his inability to maintain a relationship with Crystal.

Mark first argues that the trial court did not give sufficient consideration to the fact of his incarceration. At first blush, this seems like an odd argument to make. Typically, one would expect a person fighting the termination of parental rights to downplay his bad acts and illegal behavior. But that is not so in this case; Mark stresses his long-lasting incarceration to excuse his failure to develop a normal parental relationship with Crystal. Unfortunately for Mark, this court agrees with the trial court that his incarceration works against his claim. For one thing, it demonstrates his unwillingness to make the commitment necessary for a parental relationship—a pledge to lead a crime- and prison-free life for his daughter. For another, it demonstrates that Mark would be unlikely to enter into a stable relationship with Crystal any time soon.[1] Therefore, the trial court properly considered this factor.

This court also notes that Mark himself testified at the hearing that incarceration does not, of itself, hinder a meaningful relationship with family. Apart from his ability to correspond with his daughter, Mark spoke about a state-sponsored program that brings families to prisons for counseling. Mark did not, however, use this program, although he claims that this was because he was unaware of Crystal's whereabouts.

This excuse brings this court directly to Mark's second reason for not developing a meaningful parental relationship with Crystal: his claim of April's misconduct in keeping Crystal's whereabouts from him. Mark argues that this court should not allow April to benefit from her misconduct. Although this

[1] Given Mark's criminal record, the sentence he recently received, and the potential sentence on charges he was recently convicted of, the trial court correctly thought it "highly optimistic on [Mark's] part to suggest that he would be available to end this separation from [Crystal] within the next two to three years."

claim merits more serious consideration than the incarceration argument, this court does not agree with Mark's premise. The trial court found that "there [were] a number of occasions when [Mark] knew or very easily could have learned where [Crystal] was." This court cannot conclude that this finding is clearly erroneous. On appeal, Mark merely states that this is a "highly questionable proposition," but does not explain why. Indeed, a review of the record demonstrates adequate support for the finding. For example, in the early 1990s, Mark's friend lived only a few blocks away from April. The friend testified that she told Mark in 1990 that Crystal and April were living nearby. April and Crystal remained at that address for four years, and received a letter directly from Mark while living there. This is ample evidence to support the court's finding that Mark knew or easily could have learned where Crystal was.

This court therefore concludes that the trial court did not erroneously exercise its discretion by finding that the termination of Mark's parental rights was in Crystal's best interests. The court's finding that Mark knew or easily could have determined Crystal's whereabouts, combined with Mark's own testimony that incarceration would not prevent his ability to establish a meaningful relationship with his daughter, adequately shows that Mark's failure to establish a relationship with Crystal was willful. Further, the trial court heard evidence that Crystal had a close relationship with her step-father, and that he wished to adopt her. This evidence is sufficient to support a finding that the termination of Mark's parental rights lie in Crystal's best interests.

Mark's second ground for appeal is based on the alleged denial of the divorce court to warn him, pursuant to § 767.24(4)(cm), STATS., that continued denial of periods of placement may result in termination of parental rights. Mark did not raise this issue at trial, however, so there is no finding of fact with respect

to whether sufficient warning was given. This court will generally not decide questions raised for the first time on appeal which involve factual elements not raised by the pleadings and not brought to the attention of the trial court. ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

Not only did Mark fail to raise this issue at trial, he also did not raise it until filing his reply brief. Initially, Mark sought to raise an equal protection claim, arguing that the legislature irrationally drew a distinction between chapter 48 proceedings (which require warnings that continued placement of the child away from the parent can result in the termination of parental rights) and divorce proceedings (which he claimed did not require such a warning). Further research, however, revealed to him that divorce proceedings do require such a warning, and in his reply brief Mark now raises the argument that he failed to obtain one. Since the trial court did not address this issue or make a finding, however, it is deemed waived.

Mark further asks that this court use its discretionary power to reverse in the interests of justice. This court sees no basis to grant such a request. The trial court's findings of fact are adequate to demonstrate that it is in Crystal's best interests to terminate Mark's parental rights. We see no indication that the interests of justice requires reversal of this order. For the forgoing reasons, the order is affirmed.

By the Court.—Order affirmed.

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