COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2956

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF BRITTAINE W. AND REGINA K., PERSONS UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TONDALIA K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

SCHUDSON, J.[1] Tondalia K. appeals from the trial court order terminating her parental rights to her daughters, Brittanie and Regina. She raises several issues. This court affirms.

I. BACKGROUND

On August 25, 1997, the State filed a petition to terminate the parental rights of Tondalia K. (the mother of Brittanie and Regina), Larry W. (the alleged father of Brittanie), and Vincent G. (the alleged father of Regina). The case proceeded to jury trial, based on an amended petition alleging that Tondalia had abandoned Brittanie, under § 48.415(1)(a)2, STATS.,[2] abused Brittanie and

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), (3) STATS.

[2] When the original dispositional order regarding Brittanie was filed on February 8, 1988, § 48.415(1)(a)2, STATS., 1985-86, provided that "the court may make a finding that grounds exist for the termination of parental rights" and that "[g]rounds for termination of parental rights" include "[a]bandonment," which "may be established by a showing that":

> [t]he 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) [regarding any grounds for termination of parental rights which may be applicable and of the conditions necessary for the child to be returned to the home] and the parent has failed to visit or communicate with the child for a period of 6 months or longer.

The statute was revised to provide that "the court *or jury* may make a finding that grounds exist for the termination of parental rights." Section 48.415(1)(a)2, STATS., 1987-88 (emphasis added). The next pertinent revision of the statute changed the introductory clause regarding abandonment from "[a]bandonment *may* be established by *a showing* that" to "[a]bandonment, *which, subject to par. (c), shall* be established by *proving* that," § 48.415(1)(a), STATS., 1995-96 (emphases added), and changed "a period of *6* months or longer" to a period of *3* months or longer," § 48.415(1)(a)2, STATS. 1995-96 (emphases added). The referenced paragraph of the same edition of the statutes provides that abandonment "is not established under [§ 48.415(1)(a)2] if the parent proves … by a preponderance of the evidence" that "the parent had good cause for having failed to [both visit and communicate] with the child throughout the time period specified in par. (1)2." *See* Section 48.415(1)(c), STATS., 1995-96.

(continued)

Regina, under § 48.415(5), STATS.,[3] and failed to assume parental responsibility for them, under § 48.415(6), STATS.[4] Following a four-day trial, the jury unanimously found that Tondalia: (1) "fail[ed] to visit or communicate with Brittanie [] for a period of six months or longer" and did not "have good cause for having failed to visit with Brittanie [] during that period"; (2) "exhibited a pattern

---

Although the record and the briefs do not reveal which edition of the statutes the parties believe to be applicable to this case, the jury instructions incorporated both the six-month period and the "good cause" provisions noted above. The parties to not dispute the appropriateness of the instructions.

[3] As applicable to this case, § 48.415(5), STATS., in combination with § 48.415, STATS., provides that grounds for termination of parental rights may include:

> Child abuse, which shall be established by proving that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and proving either of the following:
>
> (a) That the parent has caused death or injury to a child or children resulting in a felony conviction.
>
> (b) That a child has previously been removed from the parent's home pursuant to a court order under s. 48.435 after an adjudication that the child is in need of protection or services under s. 48.13(3) or (3m).

[4] Section 48.415(6)(a), STATS., in combination with § 48.415, STATS., provides that grounds for termination of parental rights may include "[f]ailure to assume parental responsibility, which shall be established by proving that the parent … of the child [has] never had a substantial parental relationship with the child."

> "[S]ubstantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Section 48.415(6)(b), STATS.

of abusive behavior which is a substantial threat to the health of [Brittanie and Regina]"; and (3) "failed to assume parental responsibility for [Brittanie and Regina]." Following a dispositional hearing, the trial court terminated Tondalia's parental rights, as well as the parental rights of the "unknown and alleged" fathers.

Trial counsel filed a notice of intent to appeal the termination of Tondalia's parental rights; appellate counsel filed the notice of appeal and subsequently filed a no merit report. On January 12, 1999, this court, in a lengthy one-judge written order by the Honorable Patricia S. Curley, rejected the no merit report and, in reiterating the bases for the order, stated:

> In summary, there may be arguable merit to attacking all three grounds found by the jury for termination. On abandonment, the argument would be that Tondalia's trial counsel was ineffective by not contesting whether she received proper warnings in prior CHIPS orders. On failure to assume parental responsibility, the general argument would be that this ground does not apply because she cared for these children during their early weeks of life. On child abuse, the general question would be whether her abuse of infants has been shown to be a substantial threat to the health of these older children.

Following a remand, the trial court held a hearing regarding the effectiveness of trial counsel and denied Tondalia's motion for post-judgment relief.

II. DISCUSSION

Tondalia first argues that "[t]he [trial] court erred in directing a verdict on question 1, as credible evidence exists to support a contrary verdict." Question one asked, "Was Brittanie [] placed, or continued in a placement, outside the home of Tondalia [] pursuant to a court order which contained the termination of parental rights notice required by law?" Although Tondalia did not object to the trial court advising the jury that "there is no dispute in the evidence as to this

question" and, therefore, that it would answer the question, "Yes," Tondalia now contends that "[t]he trial court invaded the province of the jury by making a finding of fact as a matter of law as to this element required to prove abandonment." She elaborates:

> The court made no record of the order or orders it relied upon in taking the case from the jury's hands. Moreover, the petitioner never offered any testimonial or demonstrative evidence at trial to support the court's answering question one. This court must search the dispositional orders in the record on appeal to find evidence that supports the trial court's ruling.
>
> The court could have relied on one or more of four dispositional orders that covered the time frame alleged in the amended petition … February 1990 to April 1991. However, Tondalia contends that because each order is either inapplicable or allows a competing inference to be drawn, the court erred in taking the matter from the jury….
>
> The TPR warnings contained in the first and second orders fail to accurately track the requisite statutory language and are therefore defective. At a minimum, this presents a question of fact that should have been the sole province of the jury. The original dispositional order filed February 8, 1988, warns "[i]f you fail to visit or have contact with your child or children for a minimum of six (6) months." However, sec. 48.[4]15(1)(a)2 reads "fail[] to visit or communicate with the child for a period of 6 months or longer." This conflict presents a question of fact, one to be determined by the jury and not by the judge….
>
> Also, the imprecision in the wording of the two earliest warnings mean [sic] that they do not fully comply with the requirements of sec. 48.356(2).

(record reference omitted).

Tondalia also challenges the timeliness of the third and fourth CHIPS orders containing what she acknowledges were TPR warnings exactly tracking the statutory language. She concedes, however, that if either of the first two orders contained appropriate warnings, any lack of timeliness in the

subsequent orders would not matter because "only a single notice of warning contained in a written order is mandated by [Chapter] 48." *See* ***Rock County Dep't of Soc. Servs. v. K.K.***, 162 Wis.2d 431, 435, 469 N.W.2d 881, 883 (Ct. App. 1991) ("[I]n termination cases for abandonment under sec. 48.415(1), Stats., only a single order need include the warnings."). Thus, this court first focuses on Tondalia's argument regarding the variance between the statutory language and the CHIPS orders' TPR warning language.

Whether a trial court has utilized the proper legal standard governing termination of parental rights presents a question of law this court decides *de novo*. *See* ***State v. Patricia A.P.***, 195 Wis.2d 855, 862, 537 N.W.2d 47, 49-50 (Ct. App. 1995). Tondalia directs this court's attention to the difference between the statute's specification that the parent has "failed to visit or communicate with the child for a period of 6 months or longer," and the CHIPS orders' warning that "[i]f you fail to visit or have contact with your child or children for a minimum of six (6) months," termination may follow.

Tondalia's exact contentions are somewhat unclear. Until her reply brief, she never explains whether the variance between "communicate" and "contact," or the variance between "6 months or longer," and "minimum of six (6) months," or both, form the basis for her claim.[5] Even more significantly, she

[5] The State points out that the wording of the warning in the first CHIPS order included "contact," while the wording of the second CHIPS order included "communicate." Thus, at first, it seemed reasonably safe to assume that Tondalia's quarrel related only to the variance in the wording regarding the six month period. In reply, however, Tondalia addresses both variances.

Tondalia's reply arguments are insubstantial. First, regarding the variance in the six-month language, Tondalia simply opines, "Lawyers may not have a problem with [the difference between 'six months or longer' and 'a minimum of six months'], but the warning is intended for parents with a wide range of comprehension capacities, and the statutory language is less capable of misunderstanding." Second, regarding the difference between "contact" and "communicate," Tondalia "posits that a lay person (or a logician or lawyer) may not see 'contact' and

(continued)

never offers any argument that either of those variances produces any substantial difference in meaning.

Where the wording of termination warnings is "so closely related" to the words of the statute "as to be equivalent," the warning is adequate. *See* ***A.S. v. State***, 163 Wis.2d 687, 699, 472 N.W.2d 819, 824 (Ct. App. 1991), rev'd on other grounds, 168 Wis.2d 995, 485 N.W.2d 52 (1992). As the State argues, "The language in both warnings clearly sets out the relevant factor: six months is the 'cut-off.'" Indeed, as Tondalia acknowledged in her brief to this court, her trial counsel, at the postjudgment hearing, testified that he never challenged the adequacy of the warnings because he perceived no distinction between their meaning and that of the statute. This court agrees with trial counsel's conclusion. Tondalia presents no argument to the contrary. *See* ***State v. Waste Management of Wisconsin, Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978) (this court need not supply legal research and argument to support an appellant's argument).[6] Thus, this court concludes that the warning language is equivalent to the statutory language.

'communicate' as equivalent terms." In neither instance has Tondalia alleged that she was misled and, if so, how. Further, she fails to acknowledge that one of the first two orders did include the statutory word, "communicate."

[6] Tondalia also offers what she terms a "secondary" argument: that trial counsel was ineffective for failing to object to the trial court's directed verdict on question one, for failing "to move for dismissal on insufficiency of the evidence grounds to support a finding on question one at several other points during the trial," and for "neglect[ing] to object to the court's failure to place the factual basis for its answer on the record, i.e., which dispositional order was being used to prove this element of abandonment, and why the proof was clear and unambiguous." Obviously, however, having failed to offer any argument to counter trial counsel's conclusion that no substantial difference existed between the statutory language and the CHIPS termination warnings, Tondalia cannot establish that trial counsel's performance was deficient. Moreover, Tondalia offers no argument that she suffered any prejudice from the trial court's failure to reference a more specific factual basis supporting the directed verdict on question one. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not address "amorphous and insufficiently developed" arguments).

Tondalia next argues that "[t]he evidence [was] insufficient to support the verdict that [she] never had a substantial relationship with either child," and that "counsel was ineffective for failing to argue same; … for failing to introduce evidence that [she] had a substantial relationship with her children before [their] placement in protective custody." This court disagrees.

In answers to separate special verdict questions, the jury unanimously found that Tondalia "failed to assume parental responsibility" for both Brittanie and Regina. Accordingly, the trial court's order for termination of parental rights includes the grounds that Tondalia "has failed to assume parental responsibility for [Brittanie and Regina] as defined in sec. 48.415(6), Stats." The order, tracking the statutory language, further specifies:

> [Tondalia] never has had a substantial parental relationship with either of the Children. [Tondalia] has not accepted and exercised significant responsibility for the daily supervision, education, protection or care of the Children. [Tondalia] has not expressed concern for or interest in the support, care or well-being of the Children, but has neglected or refused to provide care or support for them.

Although she casts her arguments in several directions, Tondalia primarily directs her theory to Brittanie's first three months of life and Regina's first three weeks of life, before they were placed in foster care. Tondalia contends that, "given the paucity of evidence presented for both girls' early weeks and months with their mother," the evidence was insufficient to establish she "never had a substantial parental relationship with [each] child," s*ee* § 48.415(6)(a), STATS., and that trial counsel was ineffective for failing to argue that the State was required to prove that she *never* had a substantial parental relationship with the children.

As Tondalia acknowledges, this court must affirm a jury's verdict if there is any credible evidence to support it. ***Giese v. Montgomery Ward, Inc.***, 111 Wis.2d 392, 408, 331 N.W.2d 585, 593 (1983). Thus, this court first notes Tondalia's concessions, and the limited nature of her challenge. Regarding Brittanie, she concedes that "the state presented some evidence of the parental duties during Brittanie's first three months of life." She contends, however, that the evidence was based on "knowledge" of a social worker and public health nurse that "was secondhand and not corroborated by any details." Regarding Regina, Tondalia concedes that the state presented evidence that her "parenting consisted of physical abuse," but contends that the "evidence was by negative inference." Accordingly, Tondalia offers only the argument that while the evidence perhaps proved that it was "more likely than not" that she failed to assume parental responsibility, it was insufficient to reach the higher burden of proof–"clear, satisfactory, and convincing to a reasonable certainty." *See* ***Ann M.M. v. Rob S.***, 176 Wis.2d 673, 682, 500 N.W.2d 649, 653 (1993) ("Grounds for termination must be proven by clear and convincing evidence.")

Tondalia offers no authority and no argument to suggest how this court could locate the line where evidence, to a jury's satisfaction, crosses from "more likely than not" to "clear and convincing." Tondalia does not argue that the jury was improperly instructed on the burden of proof; she does not argue that the jury failed to follow the instructions. She fails to establish any defect in evidence "by negative inference" where, as here, the circumstances of the first few weeks and months of children's lives must, at least to some extent, be reconstructed through the available evidence that developed once their abuse and neglect came to the attention of social service and health care personnel. Tondalia offers no reply to counter the State's summary of the evidence in its brief to this court, and

the guardian ad litem's argument that "the record was filled with testimony supporting the State's assertion that Tondalia K. had failed to assume parental responsibility for either Brittanie or Regina." *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted).

Tondalia, however, points to her postjudgment hearing testimony and argues that counsel was ineffective for failing to introduce evidence of her relationship with Regina. Her appellate brief explains:

> Tondalia gave compelling testimony about her acceptance and exercise of significant responsibility for the everyday parenting of Regina. Had counsel presented this at trial, it would have allowed him to negate any argument by the state or guardian ad litem that she never had the requisite relationship. Regardless of the lack of depth to the relationship [she] had with Regina during her foster care years, counsel could always return to this argument as sufficient to return a verdict in favor of [her].

(record reference omitted). Tondalia concedes that counsel's failure to introduce such evidence was based on a trial strategy, but she argues that it was not a "reasoned trial strategy."

In measuring whether trial counsel has rendered deficient performance, this court is mindful that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). Further, in this case this court must be mindful of the trial court's postjudgment determination, unchallenged beyond the allegations of ineffective assistance, that trial counsel "was prepared and … did an outstanding job." With this in mind, this court must consider trial counsel's explanation for his decision to avoid

introducing evidence of Tondalia's relationship with Regina prior to Regina's placement in foster care. Counsel testified:

> At the trial we were caught between that statute [§ 48.415(6), STATS.] and the abuse statute [§ 48.415(5), STATS.]…. If you whipsawed between two questions, you basically have to do the best you can on each of them. I mean that is kind of the thrust of what I was trying to do there. Because if you emphasize the "never [had a substantial parental relationship]" on the failure to assume [parental responsibility for Regina,] you are calling into question the entire issue of abuse, child abuse, and you then bring up the argument that the other side can then say–And in response to that–
>
> ["]Yeah, the only assumption of the parental responsibility was child abuse.["]

The record reveals a substantial basis for counsel's concern. The evidence established that Tondalia physically abused Regina during her first weeks of life, leading to Regina's placement in foster home care. Counsel reasonably concluded that any defense focusing on those first weeks of Regina's life, even if productive in countering the State's proof of "never" under § 48.415(6), STATS., would have been counterproductive in that it would have accentuated the State's proof of physical abuse under § 48.415(5), STATS. Thus, contrary to Tondalia's current contention, counsel's decision appears to have reflected a reasonable trial strategy. *See* ***State v. Felton***, 110 Wis.2d 485, 501-02, 329 N.W.2d 161, 169 (1983) (To be a reasonable trial strategy, "[t]he defense selected need not be the one that by hindsight looks best to us."). Thus, this court also rejects Tondalia's ineffective assistance of counsel claim.[7]

[7] Having rejected Tondalia's challenges to the grounds for termination under § 48.415(6), STATS., and thus having concluded that the trial court had a sufficient basis under that statute to order termination of her parental rights, this court need not consider Tondalia's additional challenges to the grounds also supporting termination under § 48.415(5), STATS. *See* (continued)

Finally, Tondalia argues that "[b]ecause the trial court erroneously exercised its discretion at the dispositional hearing by failing to articulate its reasoning as to the factors in sec. 48.426(3), the court should vacate the order and remand for rehearing." Once again, Tondalia's argument is limited in scope. She does not contend that the record does not provide the basis for termination of her parental rights; rather, she maintains that the trial court, at the dispositional hearing, "failed to articulate its application of the appropriate legal standard to the relevant facts it may have relied upon in reaching its conclusion that the best interests of the children were served by termination of [her] parental rights."

When a jury finds grounds for termination of parental rights, the trial court must determine whether termination is the appropriate disposition. *See* §§ 48.424(3), 48.427, STATS. "[T]he trial court 'must consider all the circumstances and exercise its sound discretion as to whether termination would promote the best interests of the child.'" ***Mrs. R. v. Mr. and Mrs. B.***, 102 Wis.2d 118, 131, 306 N.W.2d 46, 52 (1981).

Section 48.426(3), STATS., specifies the factors a court must consider in determining whether the best interests of a child require termination of parental rights. It provides:

> FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> (a) The likelihood of the child's adoption after termination.

Gross v. Hoffman, 227 Wis.2d 296, 300, 277 N.W.2d 663, 665 (1939) (only dispositive issue need be addressed).

> (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.

As the State concedes, "the trial court did not specifically refer to every factor." Indeed, rendering its decision terminating Tondalia's parental rights, the trial court, in the context of referring to "all of the evidence that's adduced as to what those children have gone through," declared "[t]hat [best interests] phrase alone sets forth what this Court should do." Despite the trial court's failure to address the statutory factors, this court concludes that the termination must be affirmed.

Section 48.426(3), STATS., does not require a trial court to explicitly address each factor. Instead, it provides that the court "shall consider" the factors. As the State and guardian ad litem point out, the court that determined the disposition in this case was the court that presided over the trial and dispositional hearing. The record reveals that, at the dispositional hearing, the State, the defense, and the guardian ad litem all were building upon the trial record. Thus, the additional testimony at the dispositional hearing related almost exclusively to two subjects: the potential for the children's adoptions, and Tondalia's objections to termination based on her concerns about the children's knowledge of and connection to their biological roots should termination be ordered.

In arguing disposition, defense counsel called upon the court to focus on two statutory factors: the substantial relationships among family members under § 48.426(3)(c), STATS., and the potential adoptive placement for Brittanie, presumably under § 48.426(3)(f), STATS. Thus, not surprisingly, the trial court focused on the factors relating to adoption. The dispositional record, however, also included the State's arguments making extensive references to the trial evidence, touching virtually every other factor a court must consider in determining whether termination is in a child's best interests. Thus, it would defy common sense to suggest that the trial court did not "consider" the additional factors–the very factors addressed throughout the trial and reiterated in the dispositional arguments.

Accordingly, this court concludes that the trial court's explicit reference to the "best interest[s]" standard, explicit emphasis on the factors related to the children's adoptions, and implicit consideration of all other required factors, establish that the trial court did "consider" the appropriate factors. Further, under ***Minguey v. Brookens***, 100 Wis.2d 681, 688, 303 N.W.2d 581, 583, (1981), where a trial court in a termination proceeding fails to articulate adequate findings, this court may "review the record anew and affirm if a preponderance of the evidence clearly supports the judgment." This court has reviewed the record and concludes that overwhelming evidence clearly supports the termination of Tondalia's parental rights to both Brittanie and Regina.

By the Court.—Order affirmed.

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