COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2016

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 Nos. 2016AP194
2016AP195

Cir. Ct. Nos. 2015TP000079
2015TP000080

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

J. J.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

J. J.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: DAVID C. SWANSON, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] J. J. appeals from a circuit court order terminating his parental rights to his son and to his daughter. J. J. argues that the trial court erred in determining that termination of his parental rights was in the best interest of his son and his daughter.

¶2 Because we conclude that the circuit court properly considered the relevant facts and law and reached a conclusion that a reasonable court could reach, we affirm.

BACKGROUND

¶3 J. J.'s son was born April 27, 2013, and his daughter was born March 20, 2014. Both children were born heroin-addicted to the same mother, T. C., who is not part of this appeal.[2] When J. J.'s son was born, the baby boy was admitted to the NICU and treated there for heroin withdrawal for two months. The Division of Milwaukee Child Protective Services ("DMCPS")[3] received a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] On September 25, 2015, the court, the Honorable David Swanson presiding, rendered a default judgment in favor of the State as to T. C.'s parental rights. The court determined that a termination of her parental rights was in the best interest of both children and granted the Termination of Parental Rights (TPR) petition.

[3] The Division of Milwaukee Child Protective Services (DMCPS) was formerly known as the Bureau of Milwaukee Child Welfare (BMCW).

referral but did not remove the baby from the home and instead referred the family for services. Four months after his son's birth, on August 28, 2013, J. J. was arrested for an incident of domestic violence against T. C., which she said occurred one week prior. J. J. was charged with two counts: count one, strangulation and suffocation, and count two, battery. While he remained in jail on the pending charges, three months later, on November 7, 2013, J. J. was charged with intimidating a witness for phone calls he made to T. C. related to the case.

¶4 On January 10, 2014, J. J. pled guilty to a reduced charge of battery for the August incident and to intimidating a witness for the November incident. All parties stipulated to using the criminal complaints as factual bases for each of the pleas. J. J. remained incarcerated until March 12, 2014, when he was released after being sentenced. He was placed on two years of probation and was ordered to have no contact with T. C. unless authorized by his probation officer. He met with his probation officer only one time before absconding.

¶5 On March 20, 2014, shortly after J. J. was placed on probation for domestic abuse, T. C. gave birth to J. J.'s daughter, and the baby tested positive for heroin and other opiates. On March 21, 2014, a referral was made to DMCPS, which provided the basis for DMCPS taking J. J.'s son and his daughter into custody on March 27, 2014. The referral alleged that J. J. was present at the hospital despite a current no contact order in place between J. J. and T. C. A DMCPS social worker interviewed J. J., and he admitted to knowing that both his son and his daughter had been born positive for both heroin and other opiates.

¶6 On March 28, 2014, the court[4] signed a temporary physical custody order placing both J. J.'s son and his daughter in out-of-home care, and a Child In Need of Protection and Services ("CHIPS") action was filed regarding both children. There were other court appearances on the CHIPS, none of which J. J. attended except the April 8, 2014, permanency plan review hearing.[5] J. J. appeared at the hearing. Because he was in probation absconder status for the domestic violence case, he was taken into custody on an outstanding warrant issued by J. J.'s probation agent.

¶7 On July 17, 2014, the court[6] found the children to be in need of protection or services under WIS. STAT. § 48.13(10). J. J. was not present for the court hearing, and the court found him in default. On October 16, 2014, the court signed a CHIPS order as to each child for a period of two years.[7]

¶8 On March 19, 2015, the State filed a Termination of Parental Rights ("TPR") petition, seeking to terminate the parental rights of both J. J. and T. C. to their son and daughter on the grounds of six-month abandonment under WIS. STAT. § 48.415(1)(a)3 and failure to assume parental responsibility under WIS. STAT. § 48.415(6).

[4] The Honorable Thomas Wolfgram presiding

[5] The Honorable Rebecca Bradley presiding

[6] The Honorable Kevin Costello presiding

[7] The Honorable David Swanson presiding

¶9 On September 21 through 24, 2015, a TPR grounds jury trial was held.[8] A family case manager who had been assigned to J. J.'s son and daughter testified that from the time she received the case in early April 2014 through April 2015, she had no contact with J. J. despite multiple attempts. The case manager further testified that:

- She attempted to contact J. J. in person at his last known address, by phone leaving multiple voicemail messages at multiple different numbers, and by letter to his last known address.

- She never received a letter or phone call from J. J. throughout the duration of the case.

- J. J. had not had any face-to-face contact, phone contact, or contact by letter with either his son or his daughter or their foster parents or medical or dental providers throughout the duration of the case, despite there having been no prohibition against J. J. doing so.

- As of the date of the jury trial in September 2015, J. J. had not seen his son or daughter in eighteen months, as his last contact with either child had been in March 2014, when his daughter was born.

[8] The Honorable David Swanson presiding

¶10 J. J.'s testimony supported the State's evidence. Specifically, he made the following admissions, that:

- He was incarcerated on August 28, 2013, four months after his son's birth, when he was arrested for the domestic violence incident, and he remained in custody until March 12, 2014, when he was sentenced.

- He was released at sentencing on March 12, 2014, placed on probation, and ordered to have no contact with T. C.

- He violated the no contact order when he visited T. C. and his daughter in the hospital after her birth on March 20, 2014.

- He absconded from probation after just one visit with his probation officer and was in absconder status from April 2014 to April 2015.

- He turned himself in by coming to court April 8, 2015.

- He made no attempts to contact his assigned family case manager at any time.

- He failed to attend a required domestic violence program, as required by probation, and was revoked.

- He had no contact with his son or daughter since March 2014.

- Although he gave diapers, fruit, and candy to the children's grandmother to pass along to the children, he had never paid child support.

- He acknowledged that if he had complied with his probation officer, he could have been visiting with his children.

- He understood that had he attended the court hearings, he would have known how to contact his children.

¶11 At the conclusion of the trial, the jury found the State had successfully proven both alleged grounds. The court found J. J. unfit as to both children, pursuant to WIS. STAT. § 48.424(4). J. J. appeals neither the grounds nor the unfitness orders.

¶12 The court proceeded to disposition on the TPR the following day, September 25, 2015. At that time, J. J.'s son was two-and-a-half years old and had been in foster care since he was eleven months old; J. J.'s daughter was one-and-a-half years old and had been in foster care since she was a newborn. J. J. had not seen either child since March 2014, had never seen his daughter outside the hospital, and had only seen his son for the first four months of his life before the child was removed from the home and J. J. had been incarcerated or in absconder status. At disposition the court found that termination of J. J.'s rights as to his son and daughter was in the children's best interest under WIS. STAT. § 48.426 and subsequently terminated J. J.'s parental rights. J. J. appeals. For the reasons stated herein, we affirm.

DISCUSSION

¶13 J. J. appeals the trial court's TPR decision, not its decision on grounds or unfitness. He argues on appeal that the trial court erroneously exercised its discretion when it concluded that termination of J. J.'s parental rights was in the best interest of his children. Although he does not dispute that: (1) the trial court addressed all the statutory factors and made proper findings of fact; (2) the findings were not clearly erroneous; and (3) J. J. had no relationship at all with his children, he still argues that termination was not in his children's best interest. His argument is that because he loves his children and is capable of parenting them, the trial court erred in concluding that termination of his parental rights was in the children's best interest.

¶14 We disagree with J. J. The trial court here reached a decision that a reasonable judge could reach. The court considered all of the statutory factors, as well as the additional factors that J. J. wanted considered, weighed them, and reached the reasonable, well-supported conclusion that termination was in each child's best interest.

Legal Principles

¶15 The circuit court's decision whether to terminate parental rights is discretionary. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). Generally speaking, "[a] circuit court acts within its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach." ***Bank Mut. v. S.J. Boyer Const., Inc.***, 2010 WI 74, ¶20, 326 Wis. 2d 521, 785 N.W.2d 462. When terminating parental rights, the circuit court's exercise of discretion requires the court to focus on the child's best interests. WIS. STAT.

§ 48.426(3). In doing so, the court should consider any relevant evidence but must consider six statutory factors:

> (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.

See ***id.*** *See also* ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶¶28-29, 255 Wis. 2d 170, 648 N.W.2d 402; ***Gerald O.***, 203 Wis. 2d at 153-54. The trial court here found support for its decision to terminate J. J.'s parental rights as to each of these factors while also considering all of the evidence that J. J. presented. We discuss each factor in turn below.

¶16 As to the first statutory factor, the likelihood of adoption, the social worker testified that J. J.'s son had been placed with only one foster family since his removal from his mother's home, his foster parents had been approved for adoption, and there were no identified barriers to adoption. Similarly, J. J.'s daughter had been placed with only one foster family since her release from the

hospital after birth, her foster parents had been approved for adoption, and there were no identified barriers to adoption. Both foster families had displayed commitment to adopting the children, and neither had expressed any concerns to the case worker about their ability to care for the children permanently.

¶17 Based on that record, the trial court found that the foster parents for each child wanted to adopt J. J.'s son and his daughter, respectively, and that: "It's very clear in these cases from the testimony of [the social worker] as well as the proposed adopted parents, that both [children] are very likely to be adopted after termination of parental rights."

¶18 As to the second factor, the age and health of the children, the trial court found that both children were adoptable: "Both children are very age and health appropriate for adoption."

¶19 As to the third factor, substantial relationships and any harm from severing them, the trial court found that neither child had any substantial relationship with J. J. and that it was not harmful to the children to sever their relationship with him. The court observed that it was sure J. J. *thought* he had a relationship with the children, but that any relationship was only "in [his] mind" and based on photos, because he had had no contact with either child for longer than a year, and before that, he had two years of a lack of involvement.

¶20 Referring to the time J. J. lost on criminal behavior, incarceration, and absconding, the trial court concluded:

> It is very difficult, I think, to overcome that timeline and that series of bad decisions. The ages of the children made them incredibly vulnerable. And the fact [that], instead of dealing with your legal issues, you chose to absent yourself from their lives for that extended period

> when they were so young and so vulnerable and needed full-time care tells me that you're really not capable of raising them.

¶21 The court found that with no history of parenting by J. J., the court could only speculate as to how J. J. might do as a parent. And because sheer speculation is impermissible, the court found that it would not be harmful to the children to sever their non-existing relationship with J. J.:

> As to the two children's relationships with [J. J.], again, there's really no relationship between him and [his daughter]. As to [his son], that relationship appeared to have existed about two years ago and really hasn't existed since then. And given his age, I do not believe it would be harmful to [J. J.'s son] to sever that relationship.

¶22 The trial court also considered the children's relationships with other family members and concluded that the only family members either child had a relationship with were their half-siblings: "These children appear to have relationships with their siblings and their half siblings. It's not clear that they have any substantial relationship with any other family member." Based on the testimony from the social worker and foster parents, the court found that the foster parents were committed to maintaining those relationships with the half-siblings.

¶23 As to the fourth factor, the children's wishes, the case manager testified that the relationships between each of the children and their respective foster parents are very loving, and both of the children refer to their respective foster parents as "mom" and "dad." Based on all of the testimony, the trial court found: "[t]he children are too young to express any wishes, but based on the testimony it's clear they are happy and healthy in their current placements and with the adoptive resources."

¶24 As to the fifth factor, the duration of separation from J. J., both children were separated from J. J. for most of their lives, as the court had already found in its comments on the third statutory factor. At the time of trial, J. J.'s daughter had spent her entire life away from J. J., and the only time J. J.'s son was with him was his first four months of life. After that, J. J. was either incarcerated or absconding, and his son was in foster care, where J. J. made no contact with him.

¶25 As to the sixth factor, the likelihood of a permanent placement upon termination, the trial court found that termination would provide stability and permanence for the children. At the time of disposition, J. J. remained incarcerated, and T. C.'s whereabouts were unknown. The trial court found that if J. J.'s parental rights were not terminated, the children would likely remain in foster care because of J. J.'s incarceration and inability to care for the children. However, each set of foster parents had a stable home, had the means to care for the children, loved the children, and made sure all their needs were met. The court found:

> The children's placements have been very consistent. They have been placed in those current placements for extended periods. Those placements are going extremely well. There is no likelihood of a future placement, given the success of the current placements.

¶26 J. J. concedes that the trial court appropriately considered all six factors under WIS. STAT. § 48.426(3) and does not argue that the court reached the wrong conclusion on any particular statutory factor. Rather, he argues that the "overall circumstances" don't support termination. Although he acknowledges that he had no relationship with either child, he contends that because he loves

them and *want*s to be a parent, the trial court erred in concluding that it is in their best interest to terminate his parental rights.

¶27 The first problem with J. J.'s argument is that it completely misperceives the law of best interest of the child. Best interest is analyzed from the *child*'s perspective, not from the father's perspective. *See* ***Julie A.B.***, 255 Wis. 2d 170, ¶38. The second problem with his argument is that a child's best interest requires *actual* parenting. Saying you want a relationship with your child is not the same as demonstrating a proven track record of caring for, nurturing, and supporting your child.

¶28 More specifically, J. J. argues that the "overall circumstances of this case do not support termination." J. J. points to three pieces of evidence in the record that he contends show that the trial court erred in terminating his parental rights. First, he testified that he loves his children and wants to parent them. Even if that is true, feeling and desire alone do not actually demonstrate effective parenting of children. The children's best interest requires proof. Second, he claims he parented his previous girlfriend's children and would do so with his son and daughter. He offers no corroboration for this testimony and does not address his history of failure to parent his own son and daughter in this case. And third, he claims he has had a long history of employment, which would enable him to provide financially for his son and daughter. But his claimed ability to support his children never materialized into any child support for them, and he offers no evidence, or even an explanation, as to how it will be different in the future. Accordingly, his *evidence* opposing termination amounts to his mere speculation about what he might do in the future.

¶29 The trial court appropriately considered his testimony as part of the "overall circumstances" but gave good reasons for rejecting it and concluding that it was in the children's best interest for J. J.'s parental rights to be terminated. The trial court spoke to the "overall circumstances" of this case when it stated the following: "There's just no record for you to rely on in terms of how you might raise a very young child who has been brought into the world in very difficult circumstances."

¶30 The trial court "examine[d] the relevant facts, applie[d] a proper standard of law, and, using a demonstrated rational process, reache[d] a conclusion that a reasonable judge could reach." ***Bank Mut.***, 326 Wis. 2d 521, ¶20. For the reasons stated above, the court's decision is not an erroneous exercise of discretion. As such, we affirm.

By the Court.—Orders affirmed.

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