COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP471 **Cir. Ct. No. 2013TP288**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

T. L. T.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MARK A. SANDERS and CHRISTOPHER R. FOLEY, Judges. *Affirmed*.

¶1 CURLEY, P.J.[1] T.L.T. appeals from an order terminating her parental rights to her son, E.A.T., as well as from an order denying her motion to reconsider.[2] The sole issue T.L.T. raises on appeal is that this court should exercise its discretionary reversal power as granted by WIS. STAT. § 752.35. For the reasons explained below, we affirm the dispositional order terminating T.L.T.'s parental rights to E.A.T. and the order denying T.L.T.'s motion to reconsider.

BACKGROUND

¶2 T.L.T. is the mother of E.A.T., who was born on November 25, 2003, and is now twelve years old. For approximately three years of E.A.T.'s childhood, E.A.T.'s maternal grandmother provided care for him, and the extent of T.L.T.'s involvement in her son's life during that time period, if any, is somewhat unclear.[3]

¶3 On February 1, 2012, the Bureau of Milwaukee Child Welfare (the "Bureau")[4] received a report that T.L.T. had physically abused E.A.T. During the

[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] The Honorable Mark A. Sanders presided over the dispositional hearing and entered the order terminating T.L.T.'s parental rights to E.A.T., and the Honorable Christopher R. Foley heard T.L.T.'s motion for reconsideration and entered the post-dispositional order denying T.L.T.'s motion to reconsider. We will refer to the proceedings before the Honorable Mark A. Sanders as the "trial court" and to the proceedings before the Honorable Christopher R. Foley as the "post-disposition court."

[3] The length of time E.A.T. was in his grandmother's care was disputed, and the trial court indicated it believed that E.A.T. was in his grandmother's care for at least three years; however, for the purpose of this appeal, we need not actually resolve that dispute.

[4] The Bureau of Milwaukee Child Welfare is now known as the Division of Milwaukee Child Protective Services. Because the parties referred to the agency as the Bureau of Milwaukee Child Welfare on appeal, we likewise will do so in this opinion.

investigation, E.A.T. reported that T.L.T. had been "whooping" him, and he showed the initial assessment social workers healing marks and scabs on his body. On February 7, 2012, the Bureau took E.A.T. into temporary physical custody due to the allegations of physical abuse, and E.A.T. was then found to be a child in need of protection or services ("CHIPS"). A CHIPS Dispositional Order placing E.A.T. outside of T.L.T.'s home was entered on May 16, 2012. On July 11, 2013, the CHIPS order was extended until E.A.T.'s eighteenth birthday.

¶4 The State filed a Petition for Termination of Parental Rights ("TPR") on September 26, 2013, on the ground that E.A.T. remained in continuing need of protection or services pursuant to WIS. STAT. § 48.415(2).[5] T.T stipulated to grounds for termination of parental rights on June 24, 2014, and, after conducting a thorough colloquy with T.L.T., accepting her stipulation, and hearing the State's "prove up" testimony, the trial court entered a finding of unfitness as required by WIS. STAT. § 48.424(4).

¶5 This matter thereafter proceeded to the dispositional stage, which took place over the course of multiple hearings spanning multiple months—the dispositional hearing began on December 17, 2014, and did not conclude until May 7, 2015.[6] Numerous witnesses testified during the disposition proceedings, including T.L.T., the case manager, and E.A.T.'s foster parent, V.B. In a lengthy

[5] The petition for termination of parental rights also alleged a ground for termination of E.A.T.'s alleged father's rights. The alleged father did not appear in court and was found in default. His rights are not at issue in this appeal.

[6] The disposition hearing began on December 17, 2014; however, it appears that the transcript for that hearing, identified as Record 82 in the Amended Index, incorrectly lists the date as December 18, 2014. Based on the context of that transcript and the multiple disposition hearing transcripts in the record, we assume that the date listed on Record 82 is simply a typographical error and that the transcript is of the December 17, 2014 hearing.

and thorough decision, which spanned nearly forty pages of trial transcript, the trial court analyzed the factors set forth in WIS. STAT. § 48.426. Section 48.426 requires a trial court to consider, at a minimum, the following factors at disposition: (1) the likelihood of the child's adoption after termination of parental rights; (2) the child's age and health at the time of disposition and at the time the child was removed from the home; (3) whether the child has substantial relationships with the parent or other family members, and whether termination of those relationships would be harmful to the child; (4) the child's wishes; (5) the duration of the child's separation from the parent; and (6) whether the child will be able to enter a more stable and permanent family relationship as a result of termination, taking into account the child's current placement, likelihood of future placements, and the results of prior placements.

¶6 In regard to the first factor—E.A.T.'s adoptability—the trial court explained that it was considering this factor in the "general sense" as well as in the "specific sense" as to V.B., the adoptive resource, because it could not "guarantee that [V.B.] is going to adopt." In the general sense, the trial court explained that because of E.A.T.'s age—he was nearly eleven and one-half years old at the time of the court's decision—E.A.T. was "less adoptable" than younger children; however, the trial court further concluded that E.A.T. was "not yet in that time period when it becomes extremely difficult for kids to be adopted." The trial court also noted that E.A.T. did not have any major health issues but did have some behavioral issues. Overall, the trial court determined that in the "general sense," E.A.T. was "probably at the highest end of the middle range of adoptability." Specifically as to E.A.T.'s adoptability by V.B., the trial court believed E.A.T. was "much more likely to be adopted," but even then, it "[did not] think he's at the

highest end even there," and stated that as to adoption by V.B., it "would not put [E.A.T.] any higher than the middle of the high end of likelihood of adoption."

¶7 The trial court next considered E.A.T.'s health and age when detained and at the time of the hearing and explained that this factor "gets nearly no weight" in this case.

¶8 In regard to the third factor—whether E.A.T. had a substantial relationship with T.L.T. or other family members and whether severing those relationships would be harmful to E.A.T.—the trial court found that the only substantial relationship E.A.T. had with any family members was with his mother, T.L.T., and that there would be "some harm" to E.A.T. if that relationship was severed. The trial court rejected T.L.T.'s characterization of the harm to E.A.T. as "devastating," however, and explained that it did not believe that severing the relationship with T.L.T. would be debilitating to E.A.T. The court also explained that there were certain things that could reduce, although not eliminate, the harm to E.A.T., such as the likelihood that V.B., based on her testimony, would allow future contact between E.A.T. and T.L.T. if she ultimately adopted E.A.T.

¶9 Fourth, the trial court acknowledged E.A.T.'s preference to stay with T.L.T. and that his "fall back" preference was to stay with V.B. if he could not be reunited with his mother. Next, the court considered the duration of the current separation, which was three years and three months, as well as the separation in earlier periods of E.A.T.'s life when T.L.T. was in custody. Combining the two time periods, the trial court recognized that E.A.T. had spent over half of his life out of his mother's care.

¶10 Finally, the trial court considered whether E.A.T. would have a more stable and permanent family relationship if T.L.T.'s parental rights were

terminated and concluded that he would. The trial court noted that the conditions of E.A.T.'s placement with V.B. were good whereas there would likely be areas of both stability and instability if E.A.T. was eventually placed with T.L.T. The trial court also explained that V.B.'s housing and employment situation were more stable than T.L.T.'s housing and employment, even with the progress T.L.T. had made during the course of the separation. Overall, the trial court concluded that E.A.T. would enter a more stable and permanent family relationship through termination of T.L.T.'s parental rights.

¶11 Ultimately, after considering all of these factors, the trial court found that termination was in E.A.T.'s best interests.

¶12 T.L.T. filed a Notice of Appeal on March 4, 2016. However, on March 16, 2016, she filed a motion for remand, explaining her desire to file a motion to reconsider in the trial court. T.L.T. explained that the basis for seeking reconsideration in the trial court was that on October 20, 2015—approximately five and one-half months after the trial court entered the order terminating her parental rights—the Bureau removed E.A.T. from V.B.'s home and placed him with a new adoptive resource due to V.B. allegedly having allowed her boyfriend to physically discipline her biological son. T.L.T. argued that this post-disposition change in placement "materially affected the findings of fact upon which the [trial] court had based its decision to terminate." We granted T.L.T.'s request for remand, and the post-disposition court heard arguments on T.L.T.'s motion to reconsider on May 3, 2016.

¶13 The post-disposition court denied T.L.T.'s motion to reconsider in a written letter dated and filed on May 5, 2016. T.L.T.'s motion to reconsider contained almost no citation to legal authority; thus, the post-disposition court

analyzed T.L.T.'s request under the newly discovered evidence standard set forth in WIS. STAT. § 48.46.[7] The post-disposition court concluded that a post-disposition change in placement was not newly discovered evidence within the meaning of § 48.46, and it further noted that the change in placement did not affect the advisability of the trial court's order terminating T.L.T.'s parental rights. Moreover, the post-disposition court emphasized the trial court's recognition that there was no guarantee V.B. would ultimately adopt E.A.T., as well as that the trial court had relied upon all of the factors set forth in WIS. STAT. § 48.426 in concluding that termination of T.L.T.'s parental rights was in E.A.T.'s best interests. Accordingly, the post-disposition court denied T.L.T.'s motion to reconsider. This appeal follows.

ANALYSIS

¶14 Termination of parental rights cases consist of two phases: a grounds phase, at which the factfinder determines whether there are grounds to terminate a parent's rights, and a dispositional phase, at which the factfinder determines whether termination is in the child's best interest. *See* ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶¶24-28, 255 Wis. 2d 170, 648 N.W.2d 402. During the grounds phase, "'the parent's rights are paramount.'" *See* ***id.***, ¶24 (citation omitted). "If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." WIS. STAT. § 48.424(4).

[7] We are unable to review T.L.T.'s arguments at the post-disposition hearing, as the transcript of that hearing is not in the record on appeal. In a "Statement on Transcript" filed on May 24, 2016, T.L.T., through counsel, stated that she would not be requesting a transcript for the May 3, 2016 post-disposition hearing. Moreover, in her reply brief on appeal, T.L.T. concedes that the post-disposition change in E.A.T.'s placement would not constitute newly discovered evidence, and we therefore will not address the post-disposition court's newly discovered evidence analysis.

"Once the court has declared a parent unfit, the proceeding moves to the second, or dispositional phase, at which the child's best interests are paramount." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶26, 271 Wis. 2d 1, 678 N.W.2d 856.

¶15 On appeal, T.L.T. argues that we should exercise our discretionary reversal power pursuant to WIS. STAT. § 752.35 because E.A.T.'s post-disposition change in placement results in a miscarriage of justice and the real controversy not having been tried. That statute provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Sec. 735.52.

¶16 To establish the real controversy was not tried, a party must show that the jury or court was precluded from considering important testimony that bore on an important issue or that certain evidence that was improperly received clouded a crucial issue. *See* ***State v. Johnson***, 149 Wis. 2d 418, 429, 439 N.W.2d 122 (1989), *aff'd on reh'g*, 153 Wis. 2d 121, 449 N.W.2d 845 (1990). However, the party asserting that the real controversy was not tried need not establish a probability of a different result with a new trial. *See* ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456. To the contrary, where a party seeks discretionary reversal under WIS. STAT. § 752.35 on the ground that a miscarriage of justice has occurred, that party must show that there is a

"'substantial degree of probability that a new trial would produce a different result.'" *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (one set of quotation marks omitted). "The power to grant a new trial when it appears the real controversy has not been fully tried 'is formidable, and should be exercised sparingly and with great caution.'" ***Sugden***, 330 Wis. 2d 628, ¶37. Accordingly, we will only exercise our power of discretionary reversal in exceptional cases. *See* ***id.***

¶17 Having reviewed the record, we conclude that the real controversy has been fully tried and justice has not miscarried. We therefore decline to exercise our WIS. STAT. § 752.35 discretionary reversal power.

I. The real controversy at issue has been tried.

¶18 At issue during the disposition hearing was whether termination of T.L.T.'s parental rights was in E.A.T.'s best interests. *See* WIS. STAT. § 48.426(2). To establish that termination of E.A.T.'s best interests was not tried, T.L.T. must show that the court was precluded from considering important testimony that bore on an important issue or that certain evidence that was improperly received clouded a crucial issue. *See* ***Johnson***, 149 Wis. 2d at 429. She does not, however, need to establish a probability of a different result with a new trial. *See* ***Sugden***, 330 Wis. 2d 628, ¶37. Because T.L.T. does not argue that the trial court improperly received evidence, we consider only whether the trial court was precluded from considering important testimony bearing on the question of whether termination was in E.A.T.'s best interests.

¶19 We conclude that the real controversy has been tried. At the disposition hearing, the trial court considered all of the required factors set forth in WIS. STAT. § 48.426, and on appeal, T.L.T. does not dispute that the trial court

properly applied those factors at the dispositional hearing. Rather, she contends on appeal that the post-disposition change in placement means that "[t]he real controversy as to whether it would be in [E.A.T.'s] best interests to terminate [T.L.T.'s] parental rights and allow the *new placement* to adopt [E.A.T.] has never been determined by the trial court." (Emphasis added.) The issue, however, was never whether adoption by a specific person would be in E.A.T.'s best interests; rather, the question was, as a whole and in consideration of numerous factors, whether termination was in E.A.T.'s best interests.

¶20 Furthermore, the trial court clearly and specifically explained to the parties that it was making adoptability findings both generally—meaning whether E.A.T. was adoptable by anyone—*and* specifically in regard to E.A.T.'s adoptability by V.B. In discussing E.A.T.'s adoptability, the trial court explicitly found that in the "general sense"—meaning whether E.A.T. was adoptable by *anyone*—E.A.T. was "at the highest end of the middle range of adoptability." In regard to adoption by V.B. specifically, the trial court found that E.A.T. was not "at the highest end even there" and that it did not consider E.A.T. "any higher than the middle of the high end of likelihood of adoption" by V.B. Additionally, the trial court explained that it could not guarantee that V.B. would adopt. Thus, there simply can be no doubt that the trial court, in concluding that termination was in E.A.T.'s best interests, contemplated that V.B. might not ultimately adopt E.A.T. even if T.L.T.'s parental rights were terminated. T.L.T. therefore has not established that the trial court was precluded from considering testimony that bore on an important issue. *See* ***Johnson***, 149 Wis. 2d at 429. Put simply, the post-disposition change in E.A.T.'s placement does not impact the trial court's disposition; rather, it is simply a change in circumstances during the course of adoption.

II. Justice has not miscarried.

¶21 T.L.T. also asserts that justice has miscarried as a result of E.A.T.'s post-dispositional change in placement. We disagree.

¶22 In order to establish that justice has miscarried, the party seeking discretionary reversal under WIS. STAT. § 752.35 must show a substantial degree of probability that a new trial would render a different outcome. *See* ***Darcy N.K.***, 218 Wis. 2d at 667. T.L.T. has failed to make that showing, as she does little more than assert that the trial court did not have the opportunity to consider whether termination of her parental rights would be in E.A.T.'s best interests if E.A.T. was ultimately adopted by someone other than V.B. The record belies this assertion.

¶23 Contrary to T.L.T.'s assertion that "the trial court made it clear at the dispositional hearing that only the unique relationship between [V.B.], [E.A.T.,] and [T.L.T.] justified termination of [T.L.T.'s] parental rights," the record establishes that the trial court considered not only the relationship between E.A.T. and V.B. and V.B.'s testimony that she would allow E.A.T. to maintain contact with T.L.T. upon termination, but also that the trial court explicitly explained that it was evaluating E.A.T.'s likelihood of adoption both generally (by anyone) and specifically (by V.B.). The trial court explained that it was making both findings because it "[could not] guarantee that [V.B.] is going to adopt…. I can't guarantee that it's going to occur."

¶24 Thus, while the trial court did consider the relationship between E.A.T. and V.B., as well as the likelihood that E.A.T. would be able to maintain contact with T.L.T. if adopted by V.B., the trial court was well aware at the time it made its ruling that E.A.T. might not remain with V.B. and that V.B. might not

ultimately adopt E.A.T. Thus, the trial court did have an opportunity to consider whether termination was in E.A.T.'s best interests regardless of whether he was adopted by V.B. or adopted by an unknown party. Moreover, the trial court's conclusion was based on its analysis of all of the factors set forth in WIS. STAT. § 48.426, and T.L.T. does not dispute that the trial court properly applied the statutory factors at the dispositional hearing.

¶25 Because the trial court explicitly explained to the parties that it was making adoptability findings both generally and specifically in light of the fact that it could not guarantee V.B. would ultimately adopt E.A.T., as well as the trial court's thorough consideration of *all* of the factors set forth in WIS. STAT. § 48.426, we are not convinced that a new trial would result in a different outcome. Accordingly, we will not exercise our discretionary reversal power based on the argument that justice has miscarried.

By the Court.—Orders affirmed.

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