COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2037 **Cir. Ct. No. 2014TP260**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO T.A.V. A/K/A K.N.Z., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

D. P. V.,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Order denying post-disposition motion reversed, order terminating parental rights modified, and as modified, affirmed.*

¶1 BRENNAN, P.J.[1] The State[2] appeals a trial court order dated June 14, 2016, that terminated the parental rights of D.P.V.[3] and included the following statement: "This order is stayed for a period of six months (may extend an additional six months)[.]" The State argues that the trial court lacked authority to stay the order and seeks the immediate implementation of the order. D.P.V. cross-appeals. He takes the position that this court "should affirm the circuit court's order in all respects," including the stay provision.[4] In the alternative he argues that if the stay provision in the order is invalid, the entire order is invalid, and in that case the petition must be dismissed.

¶2 A jury found that grounds existed to terminate D.P.V.'s parental rights. The trial court found that it was in the child's best interest to terminate D.P.V.'s parental rights and entered the TPR order but inserted the stay provision.

¶3 We agree with the State that the trial court lacked the authority for the stay. The legislature's enumeration of procedures for disposing of TPR

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(e) (2015-2016). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Because the State and the GAL are united in the arguments on appeal, for ease of reading we will refer to them as "the State."

[3] The State also appeals an order denying its motion for post-disposition relief.

[4] D.P.V.'s notice of cross-appeal states that he "cross-appeals from that part of the judgment dated June 14, 2016, terminating [D.P.V.'s] parental rights to the child." In his briefs on appeal and cross-appeal, however, he argues only 1) that the stay was within the trial court's authority, 2) that if it is deemed invalid, the entire order is rendered invalid, and 3) that the correct remedy is to vacate the order and order the trial court to dismiss the petition. Although arguments regarding the merits of the termination order, which he does not make, would have been the proper subject of a cross-appeal, the arguments made solely about the legal issue of the stay and its proper resolution, could have been made in response to the State's appeal, as D.P.V. acknowledges in his brief: "This argument [concerning the proper remedy if the stay is unlawful] could probably have been made in response to the state's appeal."

matters under WIS. STAT. Ch. 48 is exclusive. ***State ex rel. Harris v. Larson***, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974). Significantly, Chapter 48 includes no provision for staying a TPR order and mandates that the court shall enter an order or dismiss if the TPR is not warranted. WIS. STAT. §§ 48.427(1) to (3). Chapter 48 expressly states that its policy is to create timely permanence for children. In addition to the policy statement in 48.01, Chapter 48 creates time deadlines to discourage delays in disposition of such cases. For example it imposes a requirement that the State file a petition to terminate parental rights when a child has been in out-of-home placement for fifteen of the most recent twenty-two months, and it imposes a ten-day deadline for a trial court to reach a decision after it has heard evidence on the disposition. WIS. STAT. §§ 48.417(1)(a) and 48.427(1). Additionally the legislature created a fast-tracked appellate procedure for TPR appeals in WIS. STAT. § 806.08. Accordingly, this court concludes that the provision staying the order is without authority, vacates that part of the order imposing a stay, and affirms the order as modified.

¶4 We reject D.P.V.'s argument on cross-appeal that if the stay provision is invalid, the entire TPR order is invalid. The stay provision is easily divisible from the TPR order and accordingly we modify the trial court's TPR order to expurgate the stay provision while retaining the court's TPR order. We reverse the trial court's denial of the State's post-dispositional motion.

BACKGROUND

¶5 T.A.V. was born in June 2013 and spent more than six weeks in the neonatal intensive care unit being weaned from the drugs that she was exposed to in utero. A CHIPS order was entered in August 2013. She was continuously placed outside of a parental home.

¶6 A petition to terminate D.P.V.'s parental rights was filed October 8, 2014. [5] On February 19, 2016, a jury found that two grounds existed to terminate D.P.V.'s parental rights to T.A.V.—continuing need of protection or services, and failure to assume parental responsibility.

¶7 A dispositional hearing was held April 29, 2016. On May 2, 2016, the trial court issued a written opinion letter outlining the order he intended to make terminating parental rights as to both parents but staying the order. He concluded the letter by asking the State to draft the order terminating parental rights for his signature. On May 10, the State filed a motion for post-disposition relief, seeking to have the order implemented without the stay.

¶8 The trial court heard the State's motion on June 13, 2016, and on June 14, 2016, entered the TPR order and an order denying the post-disposition motion. The TPR order stated,

> The parental rights of [C.L.P.] and [D.P.V.] are terminated. Guardianship, placement and care responsibility, and custody of the child are transferred pending adoption to DMCPS[.]… The child's permanency plan was filed.… The CHIPS order and GAL appointment continue until the adoption. This is a final order for purposes of appeal.

(Some formatting and capitalization altered.)

¶9 The order also included the following statement:

> *This order is stayed for a period of six months (may extend an additional six months)* on the condition that Mr. [V.] comply with all conditions of the existing CHIPS order and

[5] The parental rights of C.L.P., the mother, were also terminated based on her default. C.L.P. does not appeal.

> all conditions of his existing probation order. This includes, in particular, compliance with all requirements relating to abstinence from illegal drugs or alcohol and/or abuse of prescribed or non-prescribed medications; drug treatment, and[] screening to assure absolute sobriety. *The matter will be reviewed on a regular basis by the court.* If violations of the conditions of the stay are established the stay will be lifted.

(Emphasis added.)

¶10 At the motion hearing, conceding the lack of any specific legal authority for the stay, the trial court stated that it was relying on the inherent authority of the trial court to do all things necessary to carry out its functions. The trial court denied the State's post-disposition motion. The notice of appeal and notice of cross-appeal were filed on October 17, 2016 and October 25, 2016.

¶11 Subsequent to the termination order and the order denying the motion for post-disposition relief, the record shows that the State brought a new motion dated October 3, 2016, to lift the stay and that D.P.V. opposed the motion on the grounds that it was based on allegations of conduct that occurred prior to the TPR order. But the subsequent events and filings are not in the appellate record.

¶12 Despite this omission from the record, the parties each describe the events of October 18, October 25, and November 2 in their briefs, as well as the letter of October 25, and neither raises a factual dispute with the other's description. Additionally, CCAP entries by court staff confirm the events as described by the parties.[6] A hearing was scheduled on October 18, 2016, on the

[6] We take judicial notice of the Consolidated Court Automation Programs (CCAP) records that reflect information entered by court staff. *See* WIS. STAT. § 902.01. *See also* ***Westport Ins. Corp. v. Appleton Papers, Inc.***, 2010 WI App 86, ¶82, 327 Wis. 2d 120, 787 N.W.2d 894.

State's October 3, 2016 motion. At the October 18, 2016 proceeding, an evidentiary hearing was scheduled for December 2, 2016. However, on October 27, 2016, D.P.V. filed a letter dated October 25, 2016, with the trial court inquiring whether the December 2, 2016 evidentiary hearing would be held in light of the filing of the notice of appeal by the State on October 17. In his appellate brief in chief, D.P.V. argues that "on October 18, 2016, due to the filing of the notice of appeal, the circuit court had already lost the power to rule on the state's motion." On November 2, 2016, the trial court advised counsel that the evidentiary hearing on the motion had been removed from the calendar because the trial court lacked authority to lift the stay once the notice of appeal was filed.

DISCUSSION

1. The trial court lacked authority to stay the order terminating D.P.V.'s parental rights.

a. The June 14, 2016 order is a properly appealable order under WIS. STAT. § 809.107.

¶13 As a threshold matter, we address the argument made by D.P.V. that the State's appeal should be dismissed because the TPR order from which the State appeals is not a final order, and, he implies, this court has no jurisdiction. We disagree because we conclude that the order was properly appealable under the statutory scheme for TPR orders, which differs from the appeal process for other orders. Alternatively, although we conclude that a TPR order does not have to satisfy the test for finality for non-TPR orders, we further conclude that in this case, the order satisfies the test and would be properly appealable under that analysis as well.

¶14 Determining whether an order is appealable involves the interpretation and application of statutes and therefore is a question of law subject

to independent review. ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 703, 530 N.W.2d 34 (Ct. App. 1995). D.P.V.'s argument fails because he relies on the appellate procedures in WIS. STAT. § 808.03(1), which he misapplies, and more importantly because he ignores the more specific appellate procedure for TPR orders set forth in WIS. STAT. § 809.107. That statute is entitled "Appeals in proceedings related to termination of parental rights" and begins with a clear statement that it alone controls TPR appeals. Section (1) of the statute reads: "APPLICABILITY. This section of the statute applies to the appeal of an order or judgment under s. 48.43 and *supersedes all inconsistent provisions* of this chapter." (Emphasis added.) There is no dispute here that the TPR order appealed from is an order under WIS. STAT. § 48.43 and therefore the appeal provisions of WIS. STAT. § 809.107 apply. There is also no dispute that the appeal provisions of WIS. STAT. § 808.03(1) are inconsistent with those of WIS. STAT. § 809.107. Accordingly, the plain language of WIS. STAT. § 809.107 clearly requires that it controls the TPR appeal here.

¶15 Most significantly, WISCONSIN STAT. § 809.107 does not restrict appeals of WIS. STAT. § 48.43 orders or judgments to "final" orders. The clear language of the statute says:

> A person shall initiate an appeal under this section by filing, within 30 days after the date of entry of the judgment or order appealed from, as specified in s. 808.04(7m), a notice of intent to pursue postdisposition or appellate relief with the clerk of the circuit court in which the judgment or order appealed from was entered.

WIS. STAT. § 809.107(bm).[7] There is an obvious reason for the omission of "final": TPR cases continue even after the entry of the TPR order. In WIS. STAT. § 48.43, after mandating that the trial court either dismiss or enter the TPR order, the statutory procedure contemplates further hearings—permanency planning, reviews of same, placement changes and the like. It is the nature of Chapter 48 proceedings, including TPRs, that cases continue even after the order is entered. So the legislature's plain language permitting appellate review "after entry of the judgement or order appealed from" furthers the legislative purpose of timely permanency decisions for the best interest of children.

¶16 The legislature was clearly aware of the ongoing nature of WIS. STAT. § 48.43 proceedings when it drafted WIS. STAT. § 809.107 because it stated in the final sentence of section (2)(bm) that if a final order was filed after a party took an appeal from an order or judgment, the final order would be included into the party's appeal. "If the record discloses that final adjudication occurred after the notice of intent was filed, the notice shall be treated as filed after entry of the judgment or order appealed from on the day of the entry of the final judgment or order." WIS. STAT. § 809.107(2)(bm). Notably it did not say that the subsequent filing removed the appeal court's jurisdiction over the appeal taken of the earlier non-final order.

¶17 Although we conclude he is incorrect, we address D.P.V.'s argument on the need for a final order in the interest of completeness. D.P.V. relied on

[7] WISCONSIN STAT. § 809.107's cross reference to WIS. STAT. § 808.04(7m) further supports our conclusion that appeals of TPR judgments and orders are not limited to "final" orders and judgments. In § 808.04(7m), the statute that sets forth the time for filing appeals to the court of appeals, the legislature *expressly excepted* TPR appeals from the forty-five-day filing requirement that applies to appeals from *final* judgment or orders in other cases.

WIS. STAT. § 808.03 which states the need for a *final* order prior to appeal: "A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties[.]" WIS. STAT. § 808.03(1). He argues that because the trial court here expressly stated an intent to hold future review hearings after entry of the TPR order, it was clear this was not a final order.

¶18 Even if a "final" order is required under WIS. STAT. § 809.107—and, as set forth above, we do not agree that it is—we conclude that this order is final within the meaning of WIS. STAT. § 808.03 and supporting case law, notably ***Radoff v. Red Owl Stores, Inc.***, 109 Wis. 2d 490, 493, 326 N.W.2d 240 (1982).

¶19 In ***Radoff*** our supreme court set forth the "test of finality" within the meaning of WIS. STAT. § 808.03. *See* ***id.*** The court stated the test for determining finality was not whether a subsequent order was issued by the court, but whether the language of the order showed the trial court's intent that it be a final order. ***Id.*** The court additionally suggested a clear label be placed on the order:

> It may be wise for the last document to indicate on its face that for purposes of appeal it is the final order or judgment and that no subsequent document is contemplated. This kind of careful drafting of the final order or judgment will help avoid the issue posed in this case.

Id. at 494-95.

¶20 This is precisely what the trial court did here. The TPR order stated that "the parental rights of C.L.P. and D.P.V. are terminated." The order also stated, "This is a *final order for purposes of appeal*." (Emphasis added.) The fact that subsequent actions were taken by the trial court is irrelevant to the determination of whether the order was a final one. *See* ***id.*** Because the trial court

entered an order that explicitly disposed of the TPR petition, which was the substantive issue before the court, under WIS. STAT. § 808.03 it was properly final—and appealable—under both statutes.

¶21 Additionally, we note that although we reached the merits of his argument for the sake of completeness, we agree with the State that D.P.V. is judicially estopped from arguing that the order is not final and thus not appealable because he successfully argued in the trial court that the court had lost competence to proceed due to the State's appeal. He wrote on page nine of his appellate brief, "[i]n a nutshell, then, on October 18, 2016, due to the filing of the notice of appeal, the circuit court had already lost the power to rule on the state's motion." Implicit in his statement is a concession that the notice of appeal was proper, and hence, was made on a final appealable order. The trial court agreed with him that it lacked jurisdiction to hold further hearings due to the appeal and so ruled on November 2, 2016. Under the doctrine of estoppel, a party is precluded from taking inconsistent positions on an issue. The doctrine applies under the following circumstances, all of which are true here: "the later position must be clearly inconsistent with the earlier position; ... the facts at issue should be the same in both cases; and finally, the party to be estopped must have convinced the first court to adopt its position[.]" ***Harrison v. Labor & Indus. Review Comm'n***, 187 Wis. 2d 491, 497, 523 N.W.2d 138 (Ct. App. 1994).

¶22 For all of the foregoing reasons, the TPR order of June 14, 2016 is a properly appealable order.

b. The trial court lacked the authority to stay the TPR order under WIS. STAT. § 48.427(1).

¶23 The State argues that when the trial court ordered the termination of D.P.V.'s parental rights, the trial court was without authority under the WIS. STAT. § 48.427(1) statute, which explicitly defines the trial court's options for disposition, to stay that order. This court agrees.

¶24 The statute governing dispositions in TPR cases states, "After receiving any evidence related to the disposition, the court *shall enter* one of the dispositions specified under subs. (2) to (3p) within 10 days." *See* WIS. STAT. § 48.427(1). The dispositions specified under (2) and (3)[8] state as follows:

> (2) The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights.
>
> (3) The court may enter an order terminating the parental rights of one or both parents.

WIS. STAT. § 48.427(2) and (3). Thus the trial court's only choices are dismissal or an order terminating parental rights. And it must do so within ten days.

¶25 The legislature limited the trial court's power in Chapter 48 cases to only those powers specifically conferred. In ***Harris***, the court set forth the principles for interpreting statutes in Chapter 48, the Children's Code.

> Chapter 48, Stats., the Children's Code, is a comprehensive legislative plan for dealing with children in need of supervision and neglected, dependent, and delinquent children. It is a chapter of carefully spelled out definitions and enumerated powers. Court jurisdiction is spelled out in great detail in sec. 48.12 ff. Procedures are carefully

[8] The dispositions listed in subsections WIS. STAT. § 48.427(3m) and (3p) are inapplicable in this case.

> detailed. The circumstances under which a child may be detained when first taken into custody are enumerated in sec. 48.28. *Eventual dispositions are enumerated, and legislative guidelines are carefully drawn to circumscribe judicial and administrative action.*
>
> The chapter reflects the legislature's desire to specifically define the authority of appropriate officers. Where there is evidence of such enumeration, it is in accordance with accepted principles of statutory construction to apply the maxim, expressio unius est exclusio alterius; *in short, if the legislature did not specifically confer a power, it is evidence of legislative intent not to permit the exercise of the power.*

Harris, 64 Wis. 2d at 527 (emphasis added).

¶26 In ***Harris***, the question was whether trial court judges had authority to order placement in a particular institution for a juvenile following adjudication. ***Id.*** Applying the analysis prescribed for statutory interpretation in this chapter, the court concluded, "it is apparent that there is no authority for the Children's Court judges" to order placement in that institution. ***Id.*** at 529. The ***Harris*** court first looked at the specific provisions enumerated for pre-adjudication detention and then looked at the specific provisions enumerated for post-adjudication detention. ***Id.*** It concluded that "the legislature *excluded* post-adjudication detention in this institution as an acceptable alternative." ***Id.*** at 527 (emphasis added).

¶27 The ***Harris*** court makes clear that the absence of statutory authority is dispositive in this context. The relevant statute requires a trial court, within ten days of receiving evidence related to the disposition, to "enter one of the dispositions specified under subs (2) to (3p)." WIS. STAT. § 48.427(1). One of those dispositions is an order terminating parental right; another, "if it finds that the evidence does not warrant the termination of parental rights," is to dismiss the petition. §§ 48.427(2) and (3). There is no option of ordering termination and

staying the order for a period of time for further review. The analytical framework of ***Harris*** requires the conclusion that the legislature intended to exclude any stay of a TPR order.

¶28 That would be sufficient, but ***Harris*** makes another point that is relevant in this context as well. It considered the "very structure of the Children's Code" and, reading several of the Code's provisions together, concluded that the "Code evidences the legislative intent that a child not be placed in a detention home while awaiting placement after adjudication." ***Id.*** at 529.

¶29 The very structure of the Children's Code regarding TPRs shows the legislature's clear intent that there be timely disposition of children's placement issues. The policy goals of the Children's Code include the following statement:

> The courts and agencies responsible for child welfare should also recognize that instability and impermanence in family relationships are contrary to the welfare of children and should therefore recognize the importance of eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family.

WIS. STAT. § 48.01(1)(a).

¶30 Also included among the "express legislative purposes" is the following:

> (gg) To promote the adoption of children into safe and stable families rather than allowing children to remain in the impermanence of foster care.

WIS. STAT. § 48.01(1)(gg).

¶31 In light of that purpose, the legislature requires the State to file a petition to terminate parental rights in specified circumstances, which apply here, and set strict timelines:

> **(1) Filing or joining in petition; when required.** Subject to sub. (2), an agency … shall file a petition under s. 48.42 (1) to terminate the parental rights of a parent or the parents of a child, … if … [the] child has been placed outside of his or her home … for 15 of the most recent 22 months …. If the circumstances specified in this paragraph apply, the petition shall be filed or joined in by the last day of the 15th month, as described in this paragraph, for which the child was placed outside of his or her home.

WIS. STAT. § 48.417(1) and (1a).

¶32 Appeals are also expedited in TPR cases. *See* WIS. STAT. § 809.17. In view of the heavy emphasis on timely resolution of such cases, it is clear that the legislature did not intend to authorize a trial court to insert a provision staying a TPR order "for a period of six months" and leaving open the possibility of an additional six-month stay. The very structure of the Children's Code precludes the possibility that the legislature intended to authorize such a disposition.

2. The order terminating D.P.V.'s parental rights is otherwise valid, is not indivisible from the stay, and survives the striking of the stay.

¶33 We note that D.P.V. makes no appellate challenge to the merits of the TPR order. The State, GAL and D.P.V. all agree that the issues for this court to decide are solely whether the trial court had the authority to stay the order and what the proper resolution of the case is if it did not have such authority.

¶34 Having determined that the stay was without authority, we next turn to the question of the proper remedy. All parties concede that there is no

Wisconsin law that *directly* addresses the question of how to proceed in the case of a TPR order with an unlawful provision.

¶35 D.P.V. argues that the TPR order is analogous to a contract and employs contract law to argue that the stay provision is indivisible from the rest of the order. *See* 27 Restmt. (Second) of Contracts, sec. 183 cmt. a (1981) (unjust under some circumstances to "enforc[e] the agreement as to only one part.") He therefore argues that "[i]f the stay is invalid, then so is the termination order." He argues that the fact that the trial court added the provision staying the order means that the trial court "already found that the evidence presented at the dispositional hearing does not warrant termination." He argues that the petition must be dismissed if the stay is invalid.

¶36 The State argues that "[t]here is no clear dictate in this record that supports outright dismissal of the TPR order." The GAL agrees: "Respondent's request to dismiss is not supported by anything in the record or the law." Both seek either immediate implementation of the order or remand for entry of a dispositional order.

¶37 We agree with the State and GAL. D.P.V.'s indivisibility argument is undeveloped. He cites to business cases for the proposition that a court has the authority to remove an offending provision provided it is not indivisible from the whole, but he does not apply that holding to the facts here other than in a conclusory fashion. We see guidance in ***Star Direct, Inc. v. Dal Pra***, 2009 WI 76, ¶78, 319 Wis. 2d 274, 767 N.W.2d 898. There the Wisconsin Supreme Court stated the test for divisibility: "The foundational inquiry for determining whether a covenant is divisible is whether, if the unreasonable portion is stricken, the other provision or provisions may be understood and independently enforced." ***Id.***

¶38 Here, the stay provision in the TPR order is completely divisible. It appears as a separate one-line paragraph entitled "Other." It is a stand-alone. The entirety of the TPR order is completely understandable in the absence of the stay line. It must be enforced.

¶39 Appellate courts routinely excise those portions of orders that are unlawful or unwarranted by the evidence. *See*, e.g., ***State ex rel. Herget v. Circuit Court for Waukesha Cty.***, 84 Wis. 2d 435, 445, 267 N.W.2d 309 (1978) (declining to prohibit enforcement of "that portion of the pretrial order" making the juvenile subject to discovery). *See also* WIS. STAT. § 808.09 (stating that "an appellate court may reverse, affirm, or modify the judgment or order [appealed from] as to any or all of the parties"). Accordingly, we modify the trial court order terminating D.P.V.'s parental rights and affirm it as modified.

By the Court.—Order denying motion for relief reversed, order terminating parental rights modified and, as modified, affirmed.

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