COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2017

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. 2017AP875
2017AP876

Cir. Ct. Nos. 2016TP19
2016TP20

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

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

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

T. M.,

RESPONDENT-APPELLANT.

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

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

T. M.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Affirmed*.

¶1 KLOPPENBURG, J.[1] T.M. seeks reversal of the orders terminating her parental rights to M.A.B. and M.B. T.M. argues that her due process rights were violated when she was found at trial to have abandoned her children based, in part, on a time period during which the County conditionally suspended T.M.'s parental visitation rights. More specifically, T.M.'s argument is that the circuit court's application of WIS. STAT. § 48.415(1) violated her substantive due process rights for three reasons, which she states as follows: (1) the period of abandonment included the period during which the County suspended her visits with her children conditioned on terms that were impossible for her to meet; (2) the jury was allowed to "count toward [the] period of abandonment" the period of time in which the County conditionally suspended her visits with her children, but the jury would not have been allowed to count that period of time if the visits were suspended by court order; and (3) the County was not required to prove that it made reasonable efforts to assist T.M. in meeting the conditions, as "would have been the case had the [County] alleged the ground of continuing CHIPS pursuant to WIS. STAT. § 48.415(2)." For the reasons set forth below, I address and reject each reason as stated by T.M. and affirm.

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

BACKGROUND

¶2 In January 2015, M.A.B. and M.B. were removed from T.M.'s home and placed first with their paternal grandmother and then in foster care, where they have been since. In September 2015, T.M.'s visits with M.A.B. and M.B. were suspended by the Monroe County Department of Human Services based on concerns over T.M.'s mental health. The County imposed conditions to reinstate T.M.'s visits with her children, which included submitting to drug testing; submitting to a psychological assessment; contacting the social worker at least once a week to inquire about the children's well-being and inform the social worker of updates in T.M.'s situation; acknowledging the children's birthdays, holidays, and special events; and contacting the children as determined by the social worker. Following a CHIPS hearing in January 2016, these conditions were incorporated into the resulting CHIPS dispositional order issued by the circuit court.

¶3 On June 9, 2016, the County filed a petition to terminate T.M.'s parental rights on the ground of abandonment. The County alleged that grounds for termination of T.M.'s parental rights existed under WIS. STAT. § 48.415(1)(a) because for longer than three months T.M. had "failed to contact the foster parents or the department to enquire about her children's well-being" and had "not completed the conditions that were asked of her to resume her visitation with her children." The matter of abandonment was tried to a jury in November 2016.

¶4 At trial, T.M.'s county social worker, Gina Phelps, testified that before the CHIPS hearing in January 2016, she discussed the September 2015 suspension with T.M. and the "expectations" for reinstating the visits with her children. Phelps testified that immediately after the January 2016 CHIPS hearing,

she attempted to speak with T.M. to go over the conditions that T.M. would need to fulfill to reinstate visits but T.M. was hostile toward her.

¶5 Phelps testified that from that point forward, because of T.M.'s hostility, she communicated with T.M. by letter. Phelps testified that her letters contained information relevant to the conditions for reinstatement of T.M.'s visits with her children, including: appointments Phelps had made for T.M. to complete psychological evaluations and drug tests; requests that T.M. contact Phelps regularly to update Phelps on her progress on the conditions; offers by Phelps to meet in person with T.M. in a neutral place, either with or without T.M.'s counselor present; and reminders that T.M. should be calling the foster home regularly. Phelps testified that she was not sure whether she had T.M.'s correct address, but that she had sent letters to at least two addresses she had on file and that she had on one occasion hand-delivered a letter to T.M. while T.M. was briefly incarcerated in a county jail.

¶6 Phelps testified that she sent a final letter to T.M. a few days before the County filed the petition for termination of T.M.'s parental rights. The letter included as an attachment the conditions of reinstatement and detailed all the conditions that T.M. had thus far failed to fulfill in order to reinstate visits with her children. The letter also warned T.M. that, in light of her failure to comply with the conditions, the permanency plan had been changed from a primary goal of reunification with a concurrent goal of adoption to a primary goal of adoption with a concurrent goal of reunification.

¶7 Phelps testified that T.M. never responded to the letters or otherwise contacted Phelps with updates on her progress or questions about her children's well-being, instead sending only hostile text messages; that Phelps received

updates from the health professionals with whom she had made appointments for T.M. that T.M. never showed up to the appointments; and that T.M. failed to make contact with the foster home, and never gave Phelps a reason for her failure to make contact or asked for Phelps's assistance in contacting the foster home.

¶8 M.A.B. and M.B.'s foster parents testified that T.M. never got in contact with them. They testified that they purchased a cell phone exclusively for T.M.'s use and, though they had missed calls on the cell phone, the caller never left a voicemail message and they never received text messages from T.M.

¶9 T.M. testified that she tried to complete the conditions contained in the dispositional order to reinitiate visits with her children. She testified that she only received one letter from Phelps, though when counsel for the County showed her a copy of each of the letters, she was unable to identify which one. T.M. testified that she tried to stay in contact with Phelps and called Phelps's office and cell phone numbers and left voicemail messages. She testified that when she tried to see mental health professionals as per the conditions, they would not see her because she did not have insurance. T.M. testified that she repeatedly called the foster home to speak with her children but that the foster parents never answered. She testified that had she known the cell phone would accept text messages, she would have sent them. When asked by defense counsel why she did not leave any voicemail messages, she testified that she "just didn't think it would matter." T.M. testified that she felt Phelps was working against T.M. and did not want T.M. to be reunited with her children.

¶10 A special verdict form as to each child was presented to the jury at the end of trial. The first question asked the jury, "[Were M.A.B. and M.B.] placed, or continued in a placement, outside [T.M.]'s home pursuant to a court

order which contained the termination of parental rights notice required by law[?]" The jury answered "Yes." The second question asked, "Did [T.M.] fail to visit or communicate with [M.A.B. and M.B.] for a period of three months or longer?" The jury answered "Yes." The third question, which the jury was instructed to answer only if their answers to Questions 1 and 2 were "yes," asked, "Did [T.M.] have good cause for having failed to visit with [M.A.B. and M.B.] during that period?" to which the jury answered, "No."[2] The circuit court found T.M. unfit based on the verdict.

¶11 At the subsequent dispositional hearing, the circuit court concluded that termination of T.M.'s parental rights was in M.A.B. and M.B.'s best interests and ordered the termination of T.M.'s parental rights. This appeal follows.

DISCUSSION

¶12 "Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. "In the first, or 'grounds' phase of the proceeding, the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist." ***Id.*** "If grounds for the termination of parental rights are found by the court or jury, the

[2] The jury did not answer the fourth, fifth, and sixth questions on the special verdict form because the form instructed them to do so only if they answered the preceding questions a certain way. Questions four through six asked the jury whether T.M. had good cause for having failed to communicate with M.A.B. and M.B., and whether T.M. communicated with Monroe County or with the children's foster parents and, if not, if she had good cause for having failed to do so. *See* WIS. STAT. § 48.415(1)(c)1., 2. (abandonment is not established if the parent proves he or she had good cause for failing to visit or to communicate with the child during the statutory time period). In other words, the jury did not answer the questions about the failure to communicate, because it found that T.M. had not shown good cause for her failure to visit M.A.B. and M.B.

court shall find the parent unfit." ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶18, 333 Wis. 2d 273, 797 N.W.2d 854 (quoted sources omitted). The second phase, the dispositional hearing, "occurs only after the fact-finder finds a WIS. STAT. § 48.415 ground has been proved and the court has made a finding of unfitness. In this step, the best interest of the child is the 'prevailing factor.'" ***Id.***, ¶19 (citations omitted).

¶13 T.M.'s appeal concerns the first step, establishing the statutory ground of abandonment for termination of parental rights, specifically that T.M. failed to visit or communicate with her children for a period of three months or longer. *See* WIS. STAT. § 48.415(1)(a)2. Under WIS. STAT. § 48.415(1)(a)2., abandonment may be established by demonstrating that a "child has been placed, or continued in placement, outside the parent's home by a court order" and "the parent has failed to visit or communicate with the child for a period of 3 months or longer." Under WIS. STAT. § 48.415(1)(b), "[t]he time period[] [of 3 months] shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child." If the parent has failed to communicate or visit with the child, abandonment is not established if the parent proves good cause for having failed to visit or communicate by a preponderance of the evidence. WIS. STAT. § 48.415(1)(c).

A. Impossible Conditions

¶14 T.M. argues that the application of the abandonment statute violated her due process rights because the period of abandonment included the period during which the County suspended her visits with her children conditioned on terms that were impossible for her to meet. T.M. relies on ***Kenosha Cty. DHS v. Jodie W.***, in which the Wisconsin Supreme Court held that a mother's substantive

due process rights were violated when she was found to have failed to meet a condition established for the safe return of her child under the CHIPS ground for termination (WIS. STAT. § 48.415(2)), because that condition, obtaining a suitable residence, was impossible for the mother to meet because she was incarcerated. 2006 WI 93, ¶¶47, 50-55, 293 Wis. 2d 530, 716 N.W.2d 845. The supreme court in ***Jodie W.*** held that due process "requires that the court-ordered conditions of return [be] tailored to the particular needs of the parent and child." ***Id.***, ¶51.

¶15 T.M. argues that "[l]ike ***Jodie W.***, the county has put [T.M.] in an impossible situation." Assuming, without deciding, that the holding in ***Jodie W.*** as to court-ordered conditions of return under the CHIPS ground in WIS. STAT. § 48.415(2) applies here to County-imposed conditions to reinstate visits under the abandonment ground in WIS. STAT. § 48.415(1), I reject T.M.'s analogy as unsupported by the record. The conditions of T.M.'s suspended visitation required her to submit to drug testing and a psychological assessment, to regularly contact the social worker to inquire about the children's well-being and inform the social worker of updates in her situation, and to acknowledge the children's birthdays, holidays, and special events. T.M. does not explain how these conditions were not tailored to the particular needs of her and her children. Nor does the record show that these conditions were impossible for T.M. to meet. Even if some of them may have been difficult for her to meet, T.M. does not explain why it was impossible, or even difficult for her, at a minimum, to communicate with her children by calling and writing, particularly where the foster parents provided T.M. with a cell phone to facilitate communication. In sum, T.M.'s reliance on ***Jodie W.*** to attack the constitutionality of the conditions of her visitation suspension fails.

B. No Judicial Order

¶16 T.M. argues that her due process rights were violated because the jury was allowed to "count toward [the] period of abandonment" the period of time in which the County conditionally suspended her visits with her children, but the jury would not have been allowed to count that period of time if the visits were suspended by court order. As stated, WIS. STAT. § 48.415(1)(b) provides that the time period for determining abandonment "shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child."[3] T.M. asserts that is not fair "that a social worker may suspend visits between parents and children and have the time during which the visits were suspended count toward a period of abandonment, while a judge may not." Because T.M. does not develop this argument with citation to applicable authority, I decline to consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."); ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("Arguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments." (citations omitted)).

¶17 Moreover, T.M. had the opportunity to ask the circuit court to review the County's conditional suspension of visitation. Following the January 2016 CHIPS hearing, the resulting CHIPS dispositional order provided, "[T.M.]

[3] Here, the conditions imposed by the County in September 2015 were included in a dispositional order of return issued by the circuit court in a January 2016 CHIPS proceeding. T.M. does not argue that the January 2016 order is a judicial order under WIS. STAT. § 48.415(1).

will have contact with the children as determined by the ... social worker" and "[s]hould the parent desire to initiate a judicial review, they can do so by contacting the juvenile court clerk." T.M. cannot sit on her hands and then complain that the circuit court failed to do something that she did not ask it to do.

C. Reasonable Efforts

¶18 T.M. argues that her due process rights were violated because the County was not required to prove that it made reasonable efforts to assist T.M. in meeting the conditions, as "would have been the case had the [County] alleged the ground of continuing CHIPS pursuant to WIS. STAT. § 48.415(2)." The CHIPS ground is one of ten grounds for termination of parental rights, and it requires that the circuit court find that the agency responsible for the care of the child has made a reasonable effort to provide the services ordered by the court in the prior CHIPS proceeding. WIS. STAT. § 48.415(1)-(10), (2)(a)2.b. Even if T.M. is correctly reading the statute, she does not develop an argument as to why it is unconstitutional for the legislature not to require the agency to have made reasonable efforts to help a parent under the other grounds, including under the abandonment ground in WIS. STAT. § 48.415(1). Because T.M. does not develop this argument with citation to applicable authority, I decline to consider it further. *See* ***Pettit***, 171 Wis. 2d at 646; ***Industrial Risk Insurers***, 318 Wis. 2d 148, ¶25.[4]

[4] Such "reasonable efforts" may be considered during the dispositional phase when the circuit court considers the best interests of the child. WIS. STAT. §§ 48.43, 48.426, 48.425. In this case, the court found that the County had made reasonable efforts when it considered whether termination of parental rights was in the best interests of M.A.B. and M.B.

CONCLUSION

¶19 For the reasons set forth above, I affirm the circuit court's order terminating T.M.'s parental rights to M.A.B. and M.B.

By the Court.—Orders affirmed.

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