COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 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 No. 2017AP1078 Cir. Ct. No. 2016TP295

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

R. G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 BRENNAN, P.J.[1] This is R.G.'s narrowly focused appeal from a termination of parental rights (TPR) post-disposition hearing at which the circuit court[2] concluded that R.G. had failed to present new evidence that required a new disposition hearing under WIS. STAT. § 48.46. The new evidence that R.G. relied on was that after the disposition hearing, the prospective adoptive parent, D.L., was determined to be no longer suitable to adopt due to allegations of abuse to M.G. and her sibling.[3] The post-disposition court rejected R.G.'s argument for a new disposition hearing, concluding that the new evidence—a post-disposition change in placement only—did not meet R.G.'s burden of establishing evidence "affecting the advisability of the court's original adjudication" pursuant to WIS. STAT. § 48.46(1) and ***Walworth County Department of Health & Human Services v. Wilvina S.***, Nos. 2009AP1764, 2009AP1765, 2009AP1766, and 2009AP1767, unpublished slip op. ¶22 (WI App Feb. 24, 2010) (citing ***Schroud v. Milw. Cty. Dep't of Pub. Welfare***, 53 Wis. 2d 650, 654, 193 N.W.2d 671 (1972)). We agree.

¶2 The TPR disposition adjudication statute, WIS. STAT. § 48.426(3)(a) requires a court to determine whether a child in a TPR proceeding is *adoptable.* The circuit court here made that finding and it is supported by the record. And although the evidence at the disposition hearing did demonstrate that D.L., the foster parent at that time, was a "prospective" adoptive resource, the statute does

[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.

[2] The Hon. Christopher R. Foley presided at the grounds, disposition and post-disposition hearings in this case.

[3] M.G.'s sibling is not part of this case.

not require, nor did the disposition court order, that a particular person be named as the adoptive parent. In fact, the TPR order specifically states that guardianship and custody are awarded to the Division of Milwaukee Child Protective Services (DMCPS) for securing *an* adoption. Accordingly, we conclude that the circuit court properly exercised its discretion in denying the new disposition hearing and affirm.

BACKGROUND

¶3 M.G. was born on July 15, 2015. At birth she tested positive for marijuana and opiates. On August 18, 2015, M.G. was removed from the home of a person R.G. had placed her with. After removal she was diagnosed with inadequate fluid intake. M.G. was determined to be in need of protection and services on October 6, 2015, and a dispositional order was entered on November 5, 2015, imposing conditions R.G. must meet for the return of M.G., along with warnings about non-compliance.

¶4 A petition for termination of parental rights was filed on September 2, 2016, alleging two counts of abandonment, continuing CHIPS, and failure to assume parental responsibility. On January 23, 2017, when R.G. failed to appear for the final pretrial hearing, the court granted the State's motion for default as to R.G. The State then moved to dismiss the abandonment counts, and the court granted the motion. The court found that grounds existed for continuing CHIPS and failure to assume parental responsibility, and that R.G. was unfit. It set January 30, 2017, for the dispositional hearing.

¶5 Again at the January 30, 2017 dispositional hearing, R.G. failed to appear. The court determined after reviewing the statutory factors of WIS. STAT. § 48.426—including adoptability—that it was in M.G.'s best interest that R.G.'s

parental rights be terminated and M.G.'s guardianship and custody be transferred to DMCPS for the purpose of adoption. Notably, no part of the order named any individuals as adoptive parents. R.G.'s parental rights to M.G. were ordered terminated in a written order dated February 6, 2017.[4]

¶6 In March 2017 DMCPS filed a notice of post-disposition change of placement due to the fact that D.L., the foster parent at the time of the TPR dispositional proceedings, was found to have physically abused M.G. and her sibling.[5] M.G. was given a temporary foster placement initially and then on March 30, 2017, M.G. and her sibling were placed with the foster parents M. and T. G., where they remained for the rest of the court proceedings.

¶7 Arguing that there was "new evidence," R.G. filed a post-disposition motion on July 21, 2017, seeking a new disposition hearing. R.G. contended in the motion and on appeal that the change of placement from D.L. constituted new evidence under WIS. STAT. § 48.46 because it affects the advisability of the court's original adjudication. In support of her argument that the new evidence "affected" the court's original TPR order, R.G. points to: (1) the testimony from the case worker at the original disposition hearing that she expected M.G. to be adopted by D.L.; (2) the testimony of both the case worker and the guardian ad litem (GAL) that they believed it would be in M.G.'s best interest to be adopted by D.L.; and (3) the circuit court's statement that the foster family "is very anxious to adopt her" and that M.G. was getting "very loving care there."

[4] The order also terminated the rights of the unknown biological father, who is not part of this appeal.

[5] D.L. subsequently pled guilty to criminal charges arising out of the abuse report.

¶8 The State and the GAL opposed R.G.'s motion, and on August 22, 2017, the circuit court conducted a hearing on it. At the outset of the hearing the court informed R.G.'s counsel that it was inclined to agree with the State and the GAL that this particular new information affected change of placement only and did not affect the advisability of the original disposition. The parties presented their arguments. The GAL pointed out that M.G. was currently in the home of the adoptive resource, M. and T.G., where she was placed on March 30, 2017, and that the foster dad was present that day in court. The GAL further noted that the evidence at the disposition hearing was that R.G. was not previously an option and still is not: "It wasn't a matter of the adoptive resource versus mom, placement with mom."

¶9 After argument, the court concluded as a legal matter that the change of placement from D.L. did not affect the court's original disposition, relying on ***Wilvina S.***, Nos. 2009AP1764, 2009AP1765, 2009AP1766, and 2009AP1767. It noted that the standard under WIS. STAT. § 48.426(3)(a) is adoptability and not whether the child will be adopted by a specific person. The court further offered that it had been "devastated" when it learned about the previous foster parent's abuse of M.G., but noted that there were clear post-dispositional processes and remedies to address changes of placement, even TPRs. Thus, the court denied R.G.'s motion. R.G. appeals.

STANDARD OF REVIEW

¶10 Pursuant to WIS. STAT. § 48.46(1) and (1m), the parent whose status was terminated under a TPR order "may at any time within one year after the entering of the court's order petition the court for a rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original

adjudication." If a parent can show that such evidence exists, "the court shall order a new hearing." ***Id.*** We review the circuit court's decision denying a new disposition hearing on the grounds of new evidence for a proper exercise of discretion. ***Schroud***, 53 Wis. 2d at 654. It is well-established law in Wisconsin that a trial court properly exercises its discretion when it applies a proper standard of law, examines the relevant facts, and, using a demonstrated reasoning process, reaches a reasonable conclusion. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Under ***Schroud***, the statute requires two things before a new hearing will be ordered: "(1) There must be shown the existence of newly discovered evidence, and (2) the evidence must be of such a character as to affect the advisability of the original adjudication." ***Schroud***, 53 Wis. 2d at 654.

DISCUSSION

¶11 R.G. seeks a new disposition hearing arguing that the change of adoptive placement from D.L. is new evidence that "affects the advisability of the court's original disposition." Under our discretionary review principles we first examine whether the circuit court made the proper finding that the change of placement was not of such a character as to undermine or affect the court's original decision. That in turn entails determining whether the court's original "adoptability" finding was dependent on adoptive placement with D.L.

¶12 At a TPR dispositional hearing, WIS. STAT. § 48.426 requires the court to determine the child's best interest by considering certain enumerated factors, including the "likelihood of the child's adoption." The factors are set forth as follows in § 48.426(3):

> (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.

¶13 With regard to the only factor at issue here—adoptability—the plain language of the statute requires the court to determine one thing: whether the child is *likely to be adopted after termination*. It does not require the court to specifically make a finding or order about a particular adoptive resource. In fact, subsection (f) of the statute specifically mentions the possibility of there being *future* placements (plural). Here the court properly did just that. It found M.G. adoptable and transferred her guardianship and custody to the agency, not a particular person.

¶14 Nonetheless R.G. argues that the circuit court implicitly based its finding of adoptability on an *expectation* that D.L. would be the adoptive parent, thus making the change in placement something of a character that "affects" disposition here. R.G. cites to the court's following words as support:

> She's adoptable. Her foster family is very anxious to adopt her. She's getting very loving care there. All of that care is alleviated or substantially alleviated, the concerns that were present at the time that we had to intervene to protect this child that resulted from all the chaos and turmoil of what was going on in this child's life because of the mental health, substance abuse and homelessness issues that were

> devastating Ms. G's life.… [M.G.'s] been in [D.L.'s] house virtually all of her life. She's a little young to be expounding on what her wishes are about an issue of this magnitude, but there shouldn't be any question that in her mind this is home, this is family, this is where I should be. And I'd be an idiot not to confirm that. So I think that speaks to the last consideration as well. So I'm entering an order terminating parental rights and transferring custody and guardianship to the agency for purposes of facilitating this child's adoption as soon as possible.

¶15 The problem with R.G.'s argument is that she is putting words in the court's mouth. As these excerpts clearly show, the court never said that M.G.'s adoptability *depended on* D.L. being the adoptive parent. And it is not reasonable to infer that the court said the child was adoptable only because it "expected" the adoptive parent to be D.L. The court could have said so but did not. Instead, the court reviewed the evidence of M.G.'s adoptability by examining her adoptive placement with D.L. at that time. From that evidence the court determined that she was likely to be adopted—nothing more, nothing less. The court never *conditioned* the adoptability finding on placement with D.L., and in fact clearly ordered the child's adoption without specifying adoption by D.L.

¶16 As noted by the post-disposition court, this case is similar to the unpublished, but authored[6] case of ***Wilvina S.***, Nos. 2009AP1764, 2009AP1765, 2009AP1766, and 2009AP1767. There we rejected Wilvina's argument that a post-disposition change in placement constituted new evidence that affected the original disposition and required a new dispositional hearing under WIS. STAT. § 48.26(1). At the time of the disposition hearing, Wilvina's four children were

[6] "[A]n unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value." WIS. STAT. § 809.23(3)(b).

placed with her cousin, Thomasina, the adoptive resource. The court at disposition stated: "There is an adoptive resource waiting, Thomasina, and obviously with these … four sisters are bonded together … they want to be together … and we found an adoptive resource where they can be together." ***Id.***, ¶8. In ordering the TPR, the ***Wilvina*** trial court had gone even further than the court did here and ordered that "there will be a prospective adoptive placement with Thomasina." ***Id.*** Despite the court's words, we concluded in ***Wilvina*** that the subsequent removal of the children from Thomasina's home was not the type of new evidence that affected the dispositional order of termination of parental rights. ***Id.*** We reach that same conclusion here.

¶17 Like the court in ***Wilvina***, we conclude that the circuit court here reasonably found that M.G. was adoptable based on the fact that she was doing well with her then current adoptive resource, D.L. The court neither implied, nor explicitly found, that she must be adopted by D.L. The record shows clearly, and on appeal R.G. does not dispute, that R.G. was not fit to continue as M.G.'s parent and that it was in M.G.'s best interest that R.G.'s parental rights be terminated. The legal conclusion was that M.G. needed to move on to adoption and the court authorized DMCPS to find the proper adoptive parent from the current or future placements. No part of that original order is affected by the change of placement. It is well established that the finality of judgment in a TPR proceeding is critical, as instability and impermanence in family relationships are contrary to the welfare of children. *See* ***Oneida Cty. Dep't of Soc. Servs. v. Nicole W.***, 2007 WI 30, ¶28, 299 Wis. 2d 637, 728 N.W.2d 652.

¶18 For all of these reasons we conclude that the circuit court properly exercised its discretion in denying the motion for a new dispositional hearing and affirm.

By the Court.-Order affirmed.

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