COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2018

Sheila T. Reiff
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. 2018AP38
2018AP39

Cir. Ct. Nos. 2016TP56
2016TP57

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

C. B.,

RESPONDENT-RESPONDENT.

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

C. B.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: EVERETT MITCHELL, Judge. *Affirmed*.

¶1 FITZPATRICK, J.[1] The Dane County Department of Human Services appeals an order of the circuit court denying the Department's petition to terminate C.B.'s parental rights.[2] The Department argues that the circuit court erred in various ways in considering the requisite statutory factors enumerated in WIS. STAT. § 48.426(3). Additionally, the Department contends that the circuit court violated the Department's procedural due process rights. I reject the Department's arguments and affirm the order of the circuit court.

BACKGROUND

¶2 Pursuant to WIS. STAT. ch. 48, the Department petitioned to involuntarily terminate C.B.'s parental rights to her children, Z.B. and M.B. Prior to that, through two Child in Need of Protection and Services (CHIPS) petitions, the children were removed from C.B.'s home after Z.B.'s stepfather, who is M.B.'s biological father, physically abused Z.B., and C.B. did not intervene.[3]

¶3 The termination of parental rights (TPR) petition proceeded to a jury trial. Both sides presented evidence regarding the ground advanced by the Department; that is, whether C.B. failed to meet the conditions for the safe return

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c)(2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. These cases have been consolidated for this appeal.

[2] I will refer to the Appellant as "the Department," and the Respondent and her children by their initials.

[3] The parental rights of M.B.'s father and Z.B.'s father were terminated in the circuit court, and those decisions are not part of this appeal.

of the children to her home set forth in the dispositional orders in the underlying CHIPS cases. *See* WIS. STAT. § 48.415(2). The jury found grounds to terminate C.B.'s parental rights in August 2017.

¶4 The next month, the circuit court held a dispositional hearing over the course of an entire day. At that hearing, the court heard testimony from seven witnesses and admitted more the sixty exhibits. At the conclusion of the hearing, the court determined that terminating C.B.'s parental rights was not in the children's best interests and found that monitoring the welfare of C.B.'s children through the ongoing CHIPS cases was appropriate. The Department now appeals.

¶5 I will mention other material facts as relevant to particular arguments in the Discussion that follows.

DISCUSSION

¶6 The Department argues that the circuit court erroneously exercised its discretion in not terminating C.B.'s parental rights to Z.B. and M.B., and that the circuit court violated the Department's procedural due process rights. I address, and reject, each of these arguments in turn.[4]

I. *The circuit court did not erroneously exercise its discretion in denying the Department's petition to terminate C.B.'s parental rights.*

¶7 The Department makes several arguments that it is entitled to reversal of the circuit court's order at the dispositional phase of these proceedings

[4] The guardian ad litem representing the children did not file a brief in this court within the requisite timeframe. However, she did submit a letter to this court explaining that she joins the position of the Department.

based on the circuit court's supposed errors in considering the factors outlined in WIS. STAT. § 48.426(3). I reject the Department's arguments and conclude that the circuit court did not erroneously exercise its discretion in deciding not to terminate C.B.'s parental rights.

¶8 "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. The first phase is "the fact-finding hearing 'to determine whether grounds exist for the termination of parental rights.'" ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402 (quoting WIS. STAT. § 48.424(1)). During this phase, "the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exists." ***Steven V.***, 271 Wis. 2d 1, ¶24.

¶9 At the conclusion of the fact-finding hearing, the jury or the court determines "whether any grounds for the termination of parental rights have been proved." WIS. STAT. § 48.424(3). "If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." Sec. 48.424(4).

¶10 "A finding of parental unfitness is a necessary prerequisite to termination of parental rights, but a finding of unfitness does not necessitate that parental rights be terminated." ***Steven V.***, 271 Wis. 2d 1, ¶26. To determine if parental rights should be terminated, the proceeding moves to the second phase, a dispositional hearing. ***Julie A.B.***, 255 Wis. 2d 170, ¶28. "The outcome of this hearing is not predetermined, but the focus shifts to the interests of the child." ***Id.***; WIS. STAT. § 48.427. After the dispositional hearing, the court may enter an order

terminating the parental rights of the parent, or it may dismiss the petition if it finds that the evidence does not warrant termination. ***Julie A.B.***, 255 Wis. 2d 170, ¶28; Secs. 48.427(2)-(3). In making its determination regarding disposition, the circuit court must consider the following factors and other factors the circuit court determines are applicable:

> (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.

WIS. STAT. § 48.426(3).

¶11 This court will not overturn a circuit court's decision in a termination of parental rights proceeding unless the circuit court erroneously exercised its discretion. ***David S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). A court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law and, using a rational process, reaches a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). The circuit court's findings of fact will not be set aside unless those findings are clearly erroneous. WIS. STAT. § 805.17(2).

¶12 Here, it is undisputed that the circuit court declared C.B. to be unfit following the first phase of the TPR proceedings. The Department now challenges the circuit court's decision in the second, or dispositional, phase of the proceedings, in which the court decided not to terminate C.B.'s parental rights.

¶13 I have reviewed the transcript of the lengthy hearing at the dispositional phase including, of course, the circuit court's decision at the end of that hearing. It is not necessary to recite in detail all the findings and conclusions of the circuit court made at the conclusion of the dispositional hearing. It is sufficient to note that the circuit court explicitly considered and balanced all the factors enunciated in WIS. STAT. § 48.426(3) in reaching its decision. Also, the circuit court carefully weighed the evidence regardless of whether it favored, or did not favor, the Department's position.

¶14 The Department argues that "the circuit court … chose to in effect vacate the jury verdict as to C.B." There is no basis for that assertion. Because the circuit court came to a reasonable decision after employing a rational thought process based on careful examination of the relevant facts and applying the correct standard of law, I conclude that the circuit court did not erroneously exercise its discretion in concluding that C.B.'s parental rights should not be terminated.

¶15 The Department makes several other arguments in an attempt to undermine the circuit court's decision not to terminate C.B.'s parental rights. I reject each of the arguments.

¶16 First, the Department asserts that the circuit court erred by considering the factors set forth in WIS. STAT. § 48.415(6)(b). Because it is a factor a court must consider at the dispositional phase, the circuit court examined whether C.B. has a substantial relationship with Z.B. and M.B. *See* WIS. STAT.

§ 48.426(3)(c). In making that determination, the court considered, as one part of a lengthy analysis, the provisions of § 48.415(6)(b). That statute appears in Chapter 48, but in a context other than a TPR. Section 48.415(6)(b) calls for a court to consider factors such as "whether the person has expressed concern for or interest in the support, care or well-being of the child, [and] whether the person has neglected or refused to provide care or support for the child" when determining if there is a "substantial parental relationship." Sec. 48.415(6)(b). The circuit court found consideration of those factors to be of some assistance in its analysis of whether C.B. has a substantial relationship with Z.B. and M.B.

¶17 I conclude that the Department's argument fails for a couple reasons. The initial reason the argument fails is because it is undeveloped in that the Department never explains why the circuit court's analysis was wrong. Instead, the Department complains only that it does not like the circuit court's consideration of WIS. STAT. § 48.415(6)(b). Ordinarily, this court does not consider undeveloped arguments and that, alone, would be enough to reject this argument. *See* ***Herder Hallmark Consultants, Inc. v. Regnier Consulting Grp., Inc.***, 2004 WI App 134, ¶16, 275 Wis. 2d 349, 685 N.W.2d 564. At any rate, the second reason this argument fails is that the factors mentioned in that statute had some bearing on the issues before the court and, if consideration of § 48.415(6)(b) was of some help to the circuit court in making a difficult decision, I cannot see how that was error. As a result, I do not conclude that the circuit court erred in considering § 48.415(6)(b) as one part of its lengthy analysis.

¶18 Next, the Department argues that the circuit court's construction of WIS. STAT. § 48.426(3)(a), regarding a possible adoption of the children, was too narrow because the circuit court focused only on the likelihood of the foster parents adopting them. Specifically, the court indicated that, although the social

workers testified that the foster parents expressed a willingness to adopt the boys, it would not assign any weight to those statements because the foster parents did not testify. The Department complains that the circuit court ignored the determination by the Wisconsin Department of Children and Families that the children could be adopted by persons other than the foster parents.

¶19 This argument also falls flat. Chapter 48 does not require the circuit court to consider any specific recommendation in making its decision on adoption. Rather, the court has to consider the "likelihood of the [children's] adoption[s] after termination." WIS. STAT. § 48.426(3)(a). So, it was not error for the circuit court to focus on the persons who were specifically mentioned by the Department as possible adoptive parents. Moreover, the circuit court is not limited to considering only the factors enumerated in § 48.426(3). *See* ***Steven V.***, 271 Wis. 2d 1, ¶59. Accordingly, that the circuit court considered the likelihood of adoption by the children's foster parents does not mean the circuit court erred in making its decision.

¶20 The Department also argues that the circuit court erred when it did not recognize that C.B. "forfeit[ed]" her parental rights by failing to file what the Department believed was an adequate number of motions in the CHIPS cases in an attempt to see her children. The circuit court appropriately rejected this remarkable argument. There is no legal or factual basis to contend that a certain number of motions must be filed in a certain manner in a CHIPS case and, if not, a parent forfeits their rights to their children. Indeed, the Department points to no authority for the proposition that a parent can forfeit his or her parental rights for that reason. Of course, our supreme court has expressed a contrary view. A parent's interest in the parent-child relationship is recognized as a fundamental liberty interest that is protected by the Fourteenth Amendment. ***Steven V.***, 271

Wis. 2d 1, ¶22. Courts "indulge every reasonable presumption" against the loss of fundamental constitutional rights. ***State v. Denson***, 2011 WI 70, 56, 335 Wis. 2d 681, 799 N.W.2d 831 (quoting ***Johnson v. Zerbst***, 304 U.S. 458, 464, (1938)). Just because C.B. did not proceed in a manner the Department thinks was required of her, that does not mean she has forfeited rights as a parent as a matter of law. Accordingly, I reject the Department's argument.

¶21 In sum, I conclude that the circuit court's decision to deny the request to terminate C.B.'s parental rights was not an erroneous exercise of discretion.

II. *The circuit court did not violate the Department's due process rights.*

¶22 The Department then attacks the circuit court decision in another manner and contends that the circuit court violated its due process rights by weighing the dispositional factors enumerated in WIS. STAT. § 48.426 before the dispositional hearing and by relying upon documents contained in the underlying CHIPS cases court files in making its decision. I reject the Department's arguments and conclude that the circuit court did not violate the Department's due process rights.

¶23 The Department's first argument challenges the following statement by the circuit court: "When I look at the [dispositional] factors, I've been weighing these factors for months, even before we went to jury trial, looking at [WIS. STAT. §] 48.426." The Department argues that this comment violates its due process rights because the court "resolved" the dispositional factors "long before" the dispositional hearing took place. According to the Department, that statement created an impermissible appearance of bias, and the court's prejudgment of the

issues violated the Department's constitutional right to a fair and impartial decision-maker.

¶24 Access to a fair and impartial decision-maker is a critical aspect of procedural due process. *See* ***Guthrie v. WERC***, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983). Procedural due process is violated where bias toward a certain result is demonstrated by the decision-maker or where "the risk of bias is impermissibly high." ***Id.***; *see also* ***State v. Gudgeon***, 2006 WI App 143, ¶24, 295 Wis. 2d 189, 720 N.W.2d 114 ("[T]he appearance of bias offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances.").

¶25 "There is a presumption that a judge has acted fairly, impartially, and without prejudice." ***State v. Herrmann***, 2015 WI 84, ¶24, 364 Wis. 2d 336, 867 N.W.2d 772. The burden is on the party asserting bias to prove bias by a preponderance of the evidence. ***Id.***

¶26 Wisconsin law recognizes two forms of judicial bias: subjective bias and objective bias. ***Gudgeon***, 295 Wis. 2d 189, ¶20. Either sort of bias can violate a party's due process right to an impartial judge. ***Id.*** Subjective bias is based upon the judge's own determination as to whether he or she is able to act impartially.[5] ***Id.*** Objective bias is based on whether a reasonable person could question the judge's impartiality. ***Id.***, ¶21.

[5] The Department does not argue that there was subjective bias under WIS. STAT. § 757.19(1)(g).

¶27 I conclude that the Department has not met its burden to prove that the circuit court was biased in any fashion.

¶28 The court's comment, noted above, did not amount to a prejudgment of this case. Here, the court merely indicated that it had been "weighing" the factors for some time. Contrary to the Department's assertion, the circuit court's comment did not indicate that "the circuit court had made up its mind on disposition prior to the dispositional hearing." Rather, the circuit court implied that this was a difficult decision that had been weighing on the court for a long period of time. That the circuit court may have been aware of the statutory factors prior to the actual dispositional hearing does not violate due process because the circuit court did not indicate a decision was already made. Moreover, the decision of the circuit court at the conclusion of the dispositional hearing shows that the case was not prejudged in any way. As mentioned, the circuit court weighed the statutory factors and other applicable factors based on the findings reached by the circuit court based on evidence in the record. Simply because the Department did not get the result it wanted does not mean that there was any bias which affected the circuit court's decision. Therefore, the court's comment did not amount to objective bias.[6]

[6] The Department also contends, as an aside, that this court should set "some outer limit to the circuit court's discretion." I have no idea what to make of that statement because the Department never explains what it means. The most efficient route to dispatch the Department's offhand comment is to conclude that this argument is undeveloped and unsupported by Wisconsin law. ***Herder Hallmark Consultants, Inc. v. Regnier Consulting Grp., Inc.***, 2004 WI App 134, ¶16, 275 Wis. 2d 349, 685 N.W.2d 564. It is, therefore, rejected.

(continued)

¶29 The Department also complains that the circuit court violated the Department's due process rights when it relied on documents from the underlying CHIPS cases without giving the Department the opportunity to "consent" to the use of the documents by the circuit court. The Department goes so far as to analogize this activity to an improper ex parte contact with the court. Specifically, the Department criticizes the court's reference to documents in the clerk's CHIPS files which showed that, in those cases, C.B. requested more visits with Z.B. and M.B.

¶30 The parties agree that the CHIPS cases are inherently separate from the dispositional hearing. It is also undisputed that the circuit court relied on documents contained in the CHIPS case files in making its decision. Further, the parties agree that the Department was a party to both CHIPS cases, and the attorney for the Department in the TPR case was also the attorney for the Department in both CHIPS cases.

¶31 The Department's argument collapses on examination. It was reasonable for the judge assigned to the CHIPS cases (the same judge who presided over the TPR) to be aware of and consider documents in the court's CHIPS files. After all, the statutory ground for the TPR advanced by the

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Another argument made by the Department must be mentioned. The Department contends that the circuit court's findings and conclusions at the dispositional phase "resemble[s]" "dictatorial systems of justice." The fact that the Department lost at the dispositional phase of this case does not justify baseless and disrespectful comments about the circuit judge who presided at that hearing. That the statement quoted above was qualified by the Department in some very minor way, and that the Department claims that this was not an "attack" on the circuit judge, does not change the fact that the statement is baseless and disrespectful. The argument is not worthy of an attorney who practices before this court and, if a statement like that is made again in this court by that attorney, he may be subject to sanctions. For now, this admonition will suffice.

Department was that C.B. did not sufficiently comply with the orders in the CHIPS cases. In addition, as was noted earlier, the Department has taken the position that C.B. did not do enough in the CHIPS cases (or at least in terms of filing motions to see her children), and as a result, she has forfeited her rights as a parent. In light of those contentions by the Department, it was not a due process violation for the circuit court to consider information in the clerk's CHIPS case files that C.B. had, in fact, requested time with her children, albeit not in a motion. The Department cites no authority in support of its position, and I am aware of none. I conclude that this argument fails.

¶32 In sum, I reject the Department's due process arguments.[7]

CONCLUSION

¶33 For the foregoing reasons, the order of the circuit court is affirmed.

By the Court.—Order affirmed.

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

[7] The Department, at two points in the briefing, relies on materials not in the record to support its position. I have not considered those materials for that reason.