COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2019AP415 **Cir. Ct. No. 2017TP60**

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

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

T. S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JUAN B. COLÁS, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] T.S. appeals the circuit court's order terminating his parental rights to his son, C.P., now a 3-year-old. The court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

determined that T.S. is unfit to parent C.P., based on C.P. being a child in continuing need of protection or services (CHIPS). *See* WIS. STAT. § 48.415(2). The court then determined that termination would be in C.P.'s best interest.

¶2 In a challenge to the grounds determination, T.S. argues that the court violated his right to due process by relying on an incorrect element of the CHIPS ground. I reject this contention based on the County's well-supported harmless error argument, which T.S. concedes through silence.

¶3 In a challenge to the disposition ruling, T.S. argues that, in making its best interest of the child determination, the court improperly "imported the definition of substantial parental relationship from the unfitness ground of WIS. STAT. § 48.415(6) Failure to Assume Parental Responsibility and used that definition to examine C.P.'s relationship with T.S. and his extended family members." This argument is difficult for me to track, but in any case I reject it because it takes a statement by the court out of context and T.S. fails to show how the court's broader analysis was improper. Accordingly, I affirm.

BACKGROUND

¶4 C.P. was born in March 2016. Under an August 3, 2016 dispositional order, his continued out-of-home placement was approved. This order contained notice concerning grounds to terminate parental rights and also listed 14 "conditions of return" that his father, T.S., must satisfy before C.P. could be placed in his home.[2]

[2] The order also referenced C.P.'s mother, and the County ultimately petitioned to terminate the mother's parental rights, but proceedings involving the mother are not pertinent to either issue in this appeal.

¶5 In July 2017, the Dane County Department of Human Services (the County) petitioned for termination of the parental rights of T.S. As pertinent to the issues raised on appeal, one ground for involuntary termination was that C.P. met the elements for CHIPS under WIS. STAT. § 48.415(2).

¶6 At the end of a court trial in August 2018, the court found T.S. unfit based on C.P.'s CHIPS status. The next month the court held a disposition hearing and found that it was in C.P.'s best interest to terminate T.S.'s parental rights.

DISCUSSION

¶7 Termination of parental rights proceedings have two potential phases. ***Sheboygan County D.H.H.S. v. Julie A.B.***, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. In the first, the court determines whether grounds exist to terminate a parent's rights to his or her child. During the grounds phase, "'the parent's rights are paramount.'" ***Id.*** (quoted source omitted). Moreover, during the grounds phase, "the burden is on the government, and the parent enjoys a full complement of procedural rights." ***Id.***

¶8 If the court determines that grounds for termination of parental rights have been proven, thereby finding the parent unfit, the court proceeds to the second phase and determines whether it is in the child's best interest to terminate parental rights. In this dispositional phase, the entire focus of the proceeding shifts to the best interest of the child. ***Id.***, ¶4.

Grounds Phase

¶9 Understanding the nature of T.S.'s challenge to the court's grounds ruling requires knowledge of a change that the legislature made in 2018 to one element of WIS. STAT. § 48.415(2) (2015-16), which addresses the CHIPS ground. The 2018 change makes it easier, in some cases, for a petitioner to show the conditions for termination.

¶10 The "old" fourth element of WIS. STAT. § 48.415(2) provided that, in all cases, the petitioner had to show a substantial likelihood that the parent would not meet the conditions established for the safe return of the child to the parent's home within the 9-month period following the fact-finding hearing. *See* § 48.415(2) (2015-16). The legislature modified § 48.415(2) to eliminate this "9-month prediction" requirement, and replaced it with the following requirement:

> if the child has been placed outside the home for less than 15 of the most recent 22 months, [petitioner must show] that there is a substantial likelihood that the parent will not meet these conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home.

WIS. STAT. § 48.415(2)3. (2017-18); 2017 Wis. Act 256. Thus, under the "new" law, it is easier for a petitioner to prove termination based on CHIPS status when a child has been out of the home for 15 or more of the last 22 months.

¶11 With that background, T.S.'s due process argument involves the interaction of this statutory change with the standard that the court here used at the grounds trial to evaluate the required warnings provided to T.S. regarding grounds for possible future termination. T.S. does not contest that there was sufficient proof that he received warnings, nor does he contest that the warnings he received

were adequate. Instead, he argues that the court violated his right to due process by applying the "old law" (with the 9-month prediction requirement) to the facts in finding him unfit.

¶12 I resolve this issue based on a well-supported argument made by the County, to which T.S. does not respond. The County argues that, assuming without deciding that it was error for the circuit court to apply the "old law" standard, the result would have been the same if the court had applied the "new law." Under this view, it could not possibly have been prejudicial to T.S. for the court to have assigned to the County the *greater* burden in this regard. Therefore, the assumed use of the wrong standard on this issue would be error that was harmless. *See* ***State v. Beamon***, 2013 WI 47, ¶¶26, 50-51, 347 Wis. 2d 559, 830 N.W.2d 681; ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶¶27-35, 246 Wis. 2d 1, 629 N.W.2d 768. I see no flaw in the County's argument. Moreover, T.S. provides no reply to this well-supported argument, which I take as a concession. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (failure to refute argument in response brief may be taken as a concession).

Disposition Phase

¶13 Whether circumstances warrant termination of parental rights is within the circuit court's discretion. ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). We review the circuit court ruling for an erroneous exercise of discretion, which occurs only when the court has failed to make findings on the record, to base its decision on the standards and factors found in

WIS. STAT. § 48.426, or to explain the basis for its disposition. ***Julie A.B.***, 255 Wis. 2d 170, ¶30.[3]

¶14 T.S.'s argument challenging the disposition ruling is difficult for me to track, but it appears to proceed as follows. The circuit court demonstrated through its findings in the disposition phase that it ignored one proper factor

[3] WISCONSIN STAT. § 48.426 provides the following:

> **(1)** COURT CONSIDERATIONS. In making a decision about the appropriate disposition under s. 48.427 ["Dispositions"], the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425 ["Court report by agency"].
>
> **(2)** STANDARD. The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.
>
> **(3)** FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> (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.

described at WIS. STAT. § 48.426(3)(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"), and improperly substituted for that factor consideration of whether T.S. and members of his extended family members had each failed to establish a "substantial parental relationship" with C.P., as that phrase is defined at WIS. STAT. § 48.415(6)(b), which is the "failure to assume parental responsibility" ground in the first phase of the termination proceedings. T.S. contends that the result of this purported misunderstanding of legal standards was that the court placed improper weight in the disposition phrase on considerations such as the demonstrated presence or absence of T.S.'s daily supervision, education, protection, and care of C.P., when the court should have instead been limiting its consideration narrowly to facts bearing on the presence or absence of emotional and psychological bonds between C.P. and T.S. and his extended family members, including facts that "transcend time and rationality."

¶15 At least as argued by T.S., this ignores our proper standard of review as stated above, under which it is the responsibility of the circuit court, not this court, to exercise discretion in weighing the WIS. STAT. § 48.426(3) factors. In addition, T.S.'s argument distorts the legal standard by focusing narrowly on one factor. *See* ***Darryl T.-H. v. Margaret H.***, 2000 WI 42, ¶35, 234 Wis. 2d 606, 610 N.W.2d 475 ("exclusive focus on any one factor is inconsistent with the plain language of" § 48.426(3)). But putting those problems to the side, I reject the argument for a different reason. T.S. fails to support his premise by pointing to any portion of the transcript, properly understood in the context of the transcript as a whole, in which the court improperly relied on the "substantial parental relationship" defined by WIS. STAT. § 48.415(6)(b) in making the best interest determination, or in which the court demonstrated that it failed to consider

whether C.P. "has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships." Sec. 48.426(3)(c).

¶16 As his sole evidence to support his premise, T.S. points to one reference by the court, in the course of a thoughtful discussion about T.S.'s relationship with C.P. The court referred to the legal definition of "substantial relationship" of a parent as meaning "the daily responsibilities of parenting to actually caring for and rearing the child on a consistent basis over a period of time." In this same portion of the transcript, however, the court immediately gave T.S. credit for having "in some respects, a strong relationship" with C.P., despite the lack of having assumed daily parenting responsibilities. And, the court then moved on to a discussion of the issue of whether the relationships between C.P. and T.S.'s extended family were "substantial," without reference to daily parenting responsibilities.

¶17 A reasonable reading of the court's reference to daily parenting responsibilities was that it was part of the court's broader consideration of the nature of the specific relationship between C.P. and T.S. It is not the case, as T.S. would have it, that a bright line can logically be drawn between all facts informing whether there is a "substantial relationship" between parent and child and all facts informing whether a parent has formed a "substantial parental relationship" with the child. These are necessarily fluid concepts.

¶18 More specifically, T.S. does not support his implicit contention that a circuit court may not properly consider a parent's failure to assume daily parenting responsibilities in this context because such responsibilities are unrelated to how a parent can form emotional or psychological bonds with a child.

Rather, it is evident that a court may consider such evidence, along with all other relevant evidence, as part of its overall evaluation of "the effect of a legal severance on the broader relationships existing between a child and the child's birth family," which involves consideration of the presence or absence of "emotional and psychological bonds fostered between the child and the family." *See* ***Darryl T.-H.***, 234 Wis. 2d 606, ¶21. In sum, the reference by the court that T.S. complains about does not demonstrate a mistake of law.

By the Court—Order affirmed.

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