COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0456 **Cir. Ct. No. 01-TP-000014A**

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

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

COLUMBIA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MIECHELLE G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Columbia County: RICHARD REHM, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Miechelle G. appeals an order terminating her parental rights to her three-year-old son. She claims the trial court erroneously

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

denied her post-judgment motion grounded on the court's failure to advise her of her right to substitute the judge, and improperly accepted her admission to the allegations of the petition without ascertaining the existence of a factual basis for one of the allegations. We conclude Miechelle suffered no prejudice from either asserted error, and accordingly, we reject both claims and affirm the appealed order.

BACKGROUND

¶2 The Columbia County Department of Human Services filed a petition to terminate the parental rights of Miechelle G. to her son on the grounds that the child was in continuing need of protection or services under WIS. STAT. § 48.415(2). At her initial appearance in response to the petition, the following colloquy occurred:

> THE COURT: And what response does [Miechelle] wish to make to the petition?
>
> [MIECHELLE'S COUNSEL]: We would be contesting it.
>
> THE COURT: All right. Then we have a couple of other issues, and one is the issue of substitution of judge. I commented previously that I don't believe substitution is available under the statutes, but I don't know if you had intended to explore that possibility or not, [counsel].
>
> [COUNSEL]: Judge, I don't think we were going to be pursuing that.

¶3 Miechelle subsequently changed her mind about going to trial on the allegations of the petition and opted instead to contest only the dispositional issue—whether a termination of Miechelle's rights would be in her son's best

interests.[2] The court engaged Miechelle in a colloquy and accepted her admission that her son was in continuing need of protection or services as set forth in WIS. STAT. § 48.415(2)(a). Following a dispositional hearing, the court found it in the child's best interests to terminate Miechelle's parental rights and it entered an order to that effect.

¶4 Miechelle subsequently moved for post-judgment relief on the grounds that the court had misinformed her regarding her right to request a substitution of judge. In a supporting affidavit, she averred that, based on the court's statement at the initial appearance on the petition, "I did not believe I had a right to substitute judge," and that "I would have requested the substitution of Judge Rehm had I been aware of my right to substitute judge." At the hearing on her motion, Miechelle testified consistently with her affidavit. Based on her testimony, the court ruled that "a prima facie case is made that I didn't adequately inform [Miechelle] and … [she] did not know of the right and would have asserted it had [she] known, which shifts the burden to go forward" to the department.

[2] *See* WIS. STAT. § 48.426(2) ("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."); WIS. STAT. § 48.427(2) ("The court may dismiss the petition if it finds that the evidence does not warrant the termination of parental rights."); ***B.L.J. v. Polk County Dep't of Soc. Servs.,*** 163 Wis. 2d 90, 103, 470 N.W.2d 914 (1991) ("This means that even though the jury finds the 'facts' that would constitute 'grounds' for termination, the court may still dismiss the petition if the court finds either that the evidence does not sustain any one of the jury's individual findings or that even though the findings may be supported by the evidence, the evidence of unfitness is not so egregious as to warrant termination of parental rights.").

¶5 The department then introduced an excerpt from the transcript of the initial appearance on a prior termination petition it had filed against Miechelle relating to her son.[3] The relevant portion reads as follows:

> THE COURT: I have to make the assumption that each of you understand that you have a right to be represented by an attorney as each is represented by an attorney in the proceedings today. Have you advised each of your respective clients of their right to ask for a substitution of the judge?
>
> [FATHER'S COUNSEL]: Yes, I have.
>
> [MIECHELLE'S COUNSEL]: Judge, yes.
>
> THE COURT: If they exercise that right in this case, each of you understand I am not the judge to who[m] the case is assigned.[4]
>
> [FATHER'S COUNSEL]: Yes, they—my client understands that. We do not seek any reassignment of the judge that is assigned to this case.
>
> [MIECHELLE'S COUNSEL]: My client's position is the same, Judge.

¶6 Miechelle acknowledged that she was present during the preceding colloquy on the prior petition, and that she was then represented by the same attorney who represented her on the present one. She testified, however, that she did not recall the discussion about judicial substitution in the earlier case and did not become aware of her right to substitute Judge Rehm until after the dispositional hearing in this case. In ruling on her motion, however, the court found Miechelle's testimony "incredible based upon the background of this case

[3] For reasons that are not entirely clear from the record, the department dismissed the earlier petition and subsequently filed the present one.

[4] Judge James Miller conducted the initial appearance on the prior petition, explaining that "the case is assigned to Judge Richard Rehm who is not here today."

with respect to [her] knowledge of the substitution issue … [a]nd it's also incredible with respect to [her] intention to have substituted me if [she] had known of that right." The court explained further:

> I'm basing that on, of course, Judge Miller's transcript here where [she was] told of [her] rights. [Her] counsel indicated the subject had been addressed …. That's totally contrary to what testimony was given by [Miechelle] … but for [her] lack of memory. And one has to take into account how self-serving this is, for [her] to come into my court … and say that [she] would have substituted me.
>
> Now, there are other aspects of this that substantiate [her] knowledge …. [Miechelle has an] extensive criminal histor[y] where, of course, there is also the right to substitution, which one would assume had been addressed at some point along the line ….

¶7 The court went on to cite other factors which prompted it to rule that Miechelle was in fact aware of her right to substitute the assigned judge. It noted that the instant termination proceeding was part of a "continuum" that extended back to the underlying CHIPS[5] proceedings—"I have had involvement with [this child's] case … for a long, long time." The court stated that "if the issue of substitution was going to arise, it probably should have arisen a long time" before the termination proceedings, also noting that court minutes indicated Miechelle was informed of the right to substitution in the CHIPS case and had not indicated a desire to exercise it. Finally, the court noted that Miechelle was represented by counsel at the initial appearance on the instant petition, and that the record is not silent on the issue of substitution. Notwithstanding its tentative comment at the initial appearance that "I don't believe substitution is available," the court noted

[5] Child in Need of Protection or Services (CHIPS). *See* WIS. STAT. § 48.13.

that it had offered Miechelle and her counsel the opportunity to pursue the substitution issue, but they "declined to pursue the issue further."

¶8 Accordingly, the court denied Miechelle's motion, and she appeals.[6]

ANALYSIS

¶9 Miechelle first claims error in the denial of her post-judgment motion. She asserts that the court's finding that she was aware of her right to substitute the assigned judge was "clearly erroneous" because, in her view, her testimony to that effect was "uncontradicted." Miechelle relies on the following passage from ***Ashraf v. Ashraf***, 134 Wis. 2d 336, 397 N.W.2d 128 (Ct. App. 1986):

> A trial court is not required to adopt uncontradicted testimony if it is inherently improbable; however, the court cannot disregard uncontradicted testimony as to the existence of some fact or the happening of some event in the absence of something in the case which discredits the testimony or renders it against reasonable probabilities.

Id. at 345.

[6] The father had made a similar motion alleging the same grounds for relief. After the department's presentation of the transcript from the earlier termination proceedings, counsel for the father asked that his motion be "overruled," saying this:

> I believe that the transcript … that's been offered this morning … does demonstrate that, if not your Honor, at least Judge Miller informed my client of his right to judge substitution.
>
> And therefore … I would not have filed this motion had I had this transcript … [which] shows that he was informed of this right. Even if he didn't remember it [at the appearance on this petition], he was told about it.

¶10 We have no quarrel with the proposition cited but with Miechelle's view of how it should be applied to this case. Miechelle asserts that there was not "one shred of evidence" that she was aware of her right to substitution during the proceedings in this case, and that the trial court was therefore "required to accept [her] testimony as true" unless it was "inherently improbable," which she claims it was not. To the contrary, the trial court cited several facts which discredited Miechelle's testimony that she was unaware of her right to judicial substitution until after the dispositional hearing, thereby rendering her testimony "against reasonable probabilities." ***Id***. These included, most prominently, the fact that she had been clearly informed of that right at the initial hearing on the termination petition which preceded the instant one, as well as in the prior CHIPS proceedings involving this child. In addition, as the court noted, she was represented by counsel (the same attorney as in the prior termination proceedings), was presumably familiar with court procedure from involvement in criminal proceedings, and, through counsel, indicated no interest in pursuing the issue of substitution in this case.

¶11 A trial court's factual finding will not be disturbed on appeal unless it is "clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." WIS. STAT. § 805.17(2). When a trial court sits as trier of fact, it determines issues of credibility. *See* ***Fidelity & Deposit Co. v. First Nat'l Bank of Kenosha***, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980). It is well settled that a reviewing court will rarely, if ever, second guess a trial court's assessment of witness credibility. *See, e.g.,* ***Rohl v. State***, 65 Wis. 2d 683, 695, 223 N.W.2d 567 (1974). We conclude that the trial court in this case did not err in finding that, notwithstanding its failure to inform Miechelle of her right to judicial substitution, she was aware of her right to do so. The court's

rejection of her testimony to the contrary is well explained and supported in the record.

¶12 We have recently determined that a ***Bangert***-type analysis is not required whenever a claim is made that a parent subject to termination of parental rights proceedings is not properly informed of her or his rights at an initial appearance.[7] ***Steven V. v. Kelley H.***, 2003 WI App 110, ¶41, *review granted,* (Wis. Jun. 12, 2003) (No. 02-2860). Rather, we concluded that the ultimate inquiry must be whether the parent suffered any prejudice as a result of a court's failure to properly inform the parent of statutory rights. ***Id***. Relying in part on the trial court's "credibility determinations," we concluded that "there is not a reasonable possibility that the court's failure to advise [the parent] of her right to a continuance affected her decision not to request substitution." ***Id***., ¶42.

¶13 We reach the same conclusion here. Based on the entirety of the record before us, there is no reasonable possibility that the court's comment regarding the possible unavailability of judicial substitution at the initial appearance on this petition affected Miechelle's decision not to request a substitution. We are satisfied that the court did not err in finding that she and her counsel were aware of the existence of that right, and that Miechelle had no interest in pursuing a substitution.

[7] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). We note, however, that the trial court in this case did utilize a ***Bangert***-type analysis: it found a prima facie deficiency in its initial appearance colloquy, thus requiring the department to establish that Miechelle had in fact been made aware of the missing information.

¶14 Miechelle also claims that the court erred in accepting her admission that her son was in "continuing need of protection or services" under WIS. STAT. § 48.415(2)(a), the grounds alleged in the petition for termination of her parental rights, because it did not ascertain the existence of a factual basis for the allegations. She is correct that "[b]efore accepting an admission of the alleged facts in a petition" for termination of parental rights, a court "shall," among other things, "[m]ake such inquiries as satisfactorily establish that there is a factual basis for the admission." WIS. STAT. § 48.422(7)(c). She is also correct that the trial court failed to expressly engage in a factual basis inquiry at the time she proffered, and the court accepted, her admission.

¶15 The supreme court addressed a similar but not identical failure in ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607. The infirmity in ***Steven H.*** was a failure to "hear testimony in support of the allegations in the petition" when the "'petition is not contested,'" as required by WIS. STAT. § 48.422(3). ***Id.***, ¶38. The court noted that the parent in ***Steven H.*** had "agreed not to contest the allegations in the petition" but did not "admit" them, and that the two pleas are "not equivalent." ***Id.***, ¶52. Extrapolating from the court's discussion, we conclude that where a parent admits the allegations in a petition, sworn testimony to support them under § 48.422(3) is not required, but the factual basis inquiry of WIS. STAT. § 48.422(7) is. *Cf.* ***id.***

¶16 We accept Miechelle's suggestion that the supreme court's analysis in ***Steven H.*** may be applied to the present facts. Notwithstanding the trial court's failure to take testimony in support of the allegations against the parent in ***Steven H.***, the supreme court refused to reverse because, based on its review of the record, it concluded the parent "was not prejudiced by the circuit court's failure to

comply with the statute." ***Id***., ¶57. Miechelle asserts that if we apply the same analysis here, we must conclude that the error in this case was *not* harmless because the record does not "establish Miechelle had been given appropriate termination warnings prior to the filing of the termination action." We disagree.

¶17 We note first that an alleged lack of record support for "appropriate termination warnings" is the only factual basis shortcoming Miechelle cites in her opening and reply briefs. Accordingly, we take this as a concession that the record provides a factual basis for the other necessary elements of a parental rights termination under WIS. STAT. § 48.415(2)(a), such as out of home placement of the child for at least six months, reasonable efforts by the agency to provide court-ordered services, Michelle's failure to meet the conditions for return of the child, and the substantial unlikelihood of her meeting those conditions within the ensuing twelve months. We therefore will not search the record for evidence of these elements, instead focusing our review on the alleged omission—a showing that the orders placing her son outside her home "contain[ed] the notice required by [WIS. STAT. §] 48.356(2)."[8] Section 48.415(2)(a)1.

¶18 Contrary to Miechelle's assertion, the record contains items which provide a factual basis for the allegation that one or more of the orders placing the child outside the home contained the required information. First, we note that certified copies of the CHIPS orders in question, which were introduced as exhibits at the trial to establish grounds for terminating the father's rights, are

[8] WISCONSIN STAT. § 48.356(1) and (2) provide that "any written order which places a child … outside the home … shall notify the parent" of "any grounds for termination of parental rights under [WIS. STAT. §] 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home."

included in the record before us.[9] The original CHIPS dispositional order (May 2000) contains the following recitation, which is preceded by a checked box: "The parents have been advised of the applicable grounds for termination of parental rights and the conditions that are necessary for the return of the child to the home…." A subsequent order (May 8, 2001) revising and extending the original disposition contains a similar recitation and also states, preceded by a checked box: "Written TPR warnings are attached."

¶19 A document entitled "Notice Concerning Grounds to Terminate Parental Rights," on which is checked a statement of the grounds under WIS. STAT. § 48.415(2), bears what purports to be Miechelle's signature and the date "5-8-2001" below the following statement: "The court has read to me the termination of parental rights warnings checked marked above and I have received a complete copy of the entire warning notice." The date of this document and Miechelle's signature coincide with the order extending the CHIPS out-of-home placement, which preceded the filing of the termination petition by twelve months.[10] Finally, a "Court Report" prepared by a social worker for the dispositional hearing includes the following under a heading entitled "Statement of Facts Supporting the Need for Termination":

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[9] The father apparently elected to admit the allegations against him before the jury trial concluded. The father is not a party to this appeal. He attempted to file a separate appeal, but we dismissed it for lack of jurisdiction because it was not timely filed. ***Columbia County Dep't of Human Servs. v. Jonathan T.D.,*** No. 03-0608, unpublished summary order (Wis. Ct. App. Apr. 25, 2003).

[10] *See* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶3, 233 Wis. 2d 344, 607 N.W.2d 607 ("We conclude that WIS. STAT. §§ 48.356(2) and 48.415(2) require that the last order specified in § 48.356(2) placing a child outside the home, which must be issued at least six months before the filing of the petition to terminate parental rights, must contain the written notice prescribed by § 48.356(2).")

> The statutory warnings pursuant to Wisconsin Statute 48.356 were given to Miechelle on November 20, 2000 by the Honorable Judge Miller; … and to both parents on May 8, 2001. These warnings were also attached to the Court Orders.

¶20 We are thus satisfied that a factual basis exists for the only element of the grounds for the termination of Miechelle's parental rights that she claims is insufficiently demonstrated in the record—that she "had been given appropriate termination warnings prior to the filing of the termination action." We further note that we find it significant that Miechelle did not assert in the trial court, nor does she do so on appeal, that the requisite warnings and notices were not given to her. Her only claim is that there is no "testimony" in the record to that effect. As we have noted, given that she admitted the allegations of the petition, testimony was not required.

¶21 Even though the trial court failed to "[m]ake such inquiries as satisfactorily establish that there is a factual basis for the admission," WIS. STAT. § 48.422(7)(c), we have now made the necessary inquiry with respect to the notice requirement of WIS. STAT. § 48.415(2)(a). Because Miechelle "was not prejudiced by the circuit court's failure to follow the procedures mandated" by § 48.422(7)(c), "there are insufficient grounds to justify our overturning the circuit court's [order] in this case." ***Steven H.***, 233 Wis. 2d 344, ¶¶59-60.

CONCLUSION

¶22 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

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