COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2990 **Cir. Ct. No. 2008TP54**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO KURT W. F. H., A PERSON UNDER THE AGE OF 18:

WAUKESHA COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JENNIFER L. H.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County: PATRICK C. HAUGHNEY and MICHAEL O. BOHREN,[1] Judges. *Affirmed*.

[1] Judge Haughney presided over the trial and issued the order terminating Jennifer's rights, but Judge Bohren issued the order denying post-termination relief.

¶1 BROWN, C.J.[2] Jennifer L.H. appeals from a circuit court order terminating her parental rights for Kurt W.F.H. based on failure to assume parental responsibilities and continuing need of protection and services (CHIPS), as well as an order denying her post-termination relief. Jennifer claims that her failure to assume parental responsibility was not proven as a matter of law.[3] In the alternative, Jennifer argues that she was denied a fundamentally fair dispositional hearing because the trial court considered the recommendation of a guardian ad litem (GAL) who was inappropriately appointed and because the trial court misunderstood the record concerning Jennifer's visits with Kurt. We hold that adequate grounds existed for a jury to find that Jennifer failed to assume her parental responsibilities. We further hold that the GAL was properly appointed and that the trial court's misunderstanding of the record was harmless. We affirm.

FACTS

¶2 Kurt was born on January 24, 2004. He lived with his cognitively disabled mother, Jennifer, and Jennifer's mother, Margaret, for the first three years and eight months of his life. During that time he was cared for by his mother and his grandmother. When Margaret was at work, Kurt's time was split between Jennifer and day care. This arrangement ended when Margaret became ill and eventually died of an aneurysm in September 2007.

[2] This appeal is decided by one judge pursuant to WIS. STAT. RULE 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] Jennifer also argues that a new CHIPS trial is necessary in the interest of justice, since it was tried with the defective failure to assume claim. Because we hold that the failure to assume claim was not defective, this issue is irrelevant and will not be discussed.

¶3 After Margaret's death, social workers made frequent visits to Jennifer's home. They observed evidence of unsafe and unsanitary living conditions in Jennifer's home. They also witnessed Kurt engaging in several dangerous activities, such as riding his tricycle into a busy street and running through the house with a butcher knife, which Jennifer failed to correct. On October 1, 2007, less than one month after Margaret died, Kurt was removed from Jennifer's care and placed outside the home.

¶4 After Jennifer failed to meet the court's conditions for Kurt's return, a jury trial was initiated to terminate her parental rights. Jennifer was evaluated to determine whether she was competent to participate in the proceedings, but the report did not satisfactorily answer the question. The trial court decided, at the request of the county attorney and Kurt's GAL, to appoint Jennifer a GAL. Then, at the dispositional phase of the TPR proceeding, Jennifer's GAL opined that termination would be in Jennifer's best interest.

¶5 The jury found that appropriate grounds existed for termination of parental rights based on the CHIPS claim (WIS. STAT. § 48.415(2)) and the failure to assume parental responsibilities claim (§ 48.415(6)). The trial court next held a dispositional hearing on April 15, 2009, and decided that termination of parental rights was warranted and in Kurt's best interests. When stating the reasoning for its decision, the trial court erroneously mentioned that Jennifer had a dismal visitation record with Kurt, when the missed visits the court was referring to appear to have been individual appointments with Sarah Matson, a coordinator for the Supportive Parenting Program.

DISCUSSION

¶6 Jennifer contends that the failure to assume parental responsibility claim was not proven as a matter of law, because she lived with Kurt and helped raise him from the time of his birth to the time he was removed.

¶7 The Wisconsin Supreme Court recently addressed the factors that can be considered in determining whether a parent has failed to assume parental responsibility. In ***Tammy W-G v. Jacob T.***, our supreme court held that WIS. STAT. § 48.415(6) calls for fact finders to consider the totality of the circumstances over the entirety of the child's life to determine if the parent has had a substantial parental relationship with the child. ***Tammy W-G v. Jacob T.***, 2011 WI 30, ¶¶21-22, ___ Wis. 2d ___, 797 N.W.2d 854. The court also held that fact finders could properly consider, under this "totality-of-the-circumstances test," whether the parent exposed the child to a hazardous living environment. ***Id.***, ¶37.

¶8 "When reviewing a jury's verdict, we consider the evidence in the light most favorable to the verdict." ***Id.***, ¶39. In the present case, although Jennifer did live with Kurt for most of his life, there was evidence that their relationship was more that of siblings than that of parent to child, from which a jury could conclude that Jennifer failed to establish a substantial parental relationship even while living with Kurt. Further, there was ample evidence that Kurt was exposed to a very dangerous environment while he was living with Jennifer, including occasions when he rode his tricycle into the road and ran around the house with a butcher knife. From this evidence, a jury could certainly have found that Jennifer failed to establish a substantial parental relationship with Kurt.

¶9 Jennifer's next claim is that the trial court inappropriately appointed her a GAL even though her competency evaluation failed to establish that she was incompetent. Jennifer relies on WIS. STAT. § 48.235(1)(g), which states that a court "*shall* appoint a guardian ad litem for a parent who is the subject of a termination of parental rights proceeding" if an examination shows the parent to be incompetent. (Emphasis added.) This reliance is erroneous, however. The court, in appointing a GAL, was within the discretion granted by § 48.235(1)(a), which states that the court "*may* appoint a guardian ad litem in any appropriate matter under this chapter." (Emphasis added.) Subsection (1)(a) grants the court discretion to appoint a GAL "in any appropriate matter" under WIS. STAT. ch. 48; subsection (1)(g) instructs the court that, in cases of incompetency on the part of the parent, the court no longer has discretion and a GAL must be appointed. *See* § 48.235(1)(a) and (g).

¶10 The 1990 Judicial Council Note to WIS. STAT. § 48.235 states that subsection (1) "indicates when a guardian ad litem is to be appointed, *leaving broad discretion to the court* for such appointments." Judicial Council Note, 1990, § 48.235 (emphasis added). "If the record shows that the court exercised its discretion and a reasonable basis exists for its determination, the court properly exercised its discretion." ***Tralmer Sales & Serv., Inc. v. Erickson***, 186 Wis. 2d 549, 573, 521 N.W.2d 182 (Ct. App. 1994). The court, in exercising its discretion, noted how the competency report indicated that Jennifer was functioning "at an extremely limited level both cognitively and emotionally." Whether or not Jennifer was technically incompetent, her cognitive disability was a reasonable basis for the trial court to appoint a GAL under § 48.235(1)(a), and so we hold that the trial court did not erroneously exercise its discretion.

¶11 Jennifer also argues that her GAL inappropriately made a recommendation that termination would be in Jennifer's best interest and that the trial court improperly relied on that recommendation. She bases this argument on WIS. STAT. § 48.235(5m)(b), which states that a GAL may not "participate in the proceeding as a party, and may not … participate in any activity at trial that is required to be performed by the parent's adversary counsel." In this case, Jennifer does not allege any improper participation by the GAL other than the assertion at the dispositional phase that termination was in Jennifer's best interest. The GAL based that assertion in part on the possibility of future criminal problems arising from her inability to properly care for her child.

¶12 We find that the GAL's recommendation, even if improper, was harmless error. WISCONSIN STAT. § 805.18(2) provides in pertinent part:

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of ... error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has *affected the substantial rights* of the party seeking to reverse or set aside the judgment, or to secure a new trial.

(Emphasis added.) "For an error to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768. Jennifer asserts that the trial court relied on the recommendation because it stated that "the court did want to hear from mom's guardian ad litem as to what was in her best interest." But the trial court's own comments, when taken in context, belie that argument. It stated that "the court needs to emphasi[ze] that I don't look towards avoiding any criminal entanglement for mom in terms of for the future, but the court did want to hear

from mom's guardian ad litem as to what was in her best interest." The fact that the trial court wanted to hear from the GAL does not persuade us that it actually relied on the recommendation in making its decision—to the extent that the recommendation was error, we find that it was harmless.

¶13 Jennifer's next argument is that the trial court erroneously based its termination order on Jennifer's "dismal" record of missing visits with Kurt, when the visits the court referred to were actually missed appointments with a coordinator for the Supportive Parenting Program. Based on the record before us, it does appear that the trial court confused the visits that Jennifer missed. The court mentions several missed visits from August to December 2008 that were not in Matson's testimony regarding missed visits with Kurt. We conclude, however, that the mistake was harmless, and it did not affect the trial court's decision.

¶14 The trial court was required to consider Kurt's best interests as the prevailing factor when deciding whether to terminate Jennifer's parental rights. WIS. STAT. § 48.426(2). In considering Kurt's best interests, the trial court was statutorily required to consider, among other things, Kurt's wishes, his likelihood of adoption, his age and health, his relationship with Jennifer and other family members, how long he had been separated from Jennifer, and whether he would be able to enter a more stable and permanent family relationship as a result of the termination. Sec. 48.426(3).

¶15 The trial court's misunderstanding of Jennifer's visitation record was considered with regard to the last factor, whether Kurt could enter into a more stable family relationship after termination. In considering that factor, the court also noted the Jennifer was living "in squalor," and that Jennifer had failed to prevent Kurt from engaging in dangerous behaviors. The misunderstanding by the

trial court was only one of several considerations that went into one of the six factors the court was considering. It does not undermine our confidence in the proceeding's result.

¶16 Finally, Jennifer argues that her trial counsel was ineffective for failing to object to the GAL's recommendation or the trial court's erroneous recitation of Jennifer's visits with her child. For the reasons explained in our harmless error analysis, we are not persuaded that trial counsel's errors, if any, were prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶61, 301 Wis. 2d 642, 734 N.W.2d 115 ("Under the two-pronged test that underlies the claim of ineffective assistance of counsel, we need not address both the performance and the prejudice elements, if the defendant cannot make a sufficient showing as to one or the other element.").

By the Court.—Orders affirmed.

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