COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2240 **Cir. Ct. No. 2011TP43**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ANGIE A.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed*.

¶1 CURLEY, P.J.[1] Angie A. appeals from the order terminating her parental rights to Alicia A. She argues that because the State did not rely on the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

(continued)

ground found in WIS. STAT. § 48.415(3), titled "continuing parental disability," a ground which is specifically designed for parents who are mentally ill or developmentally disabled, but instead "shoehorn[ed] Angie A.'s situation" into the grounds of a child in "continuing need of protection or services" found in WIS. STAT. § 48.415(2) and "failure to assume parental responsibility" found in WIS. STAT. § 48.415(6), the Bureau of Milwaukee Children's Welfare (Bureau) did not make reasonable efforts to provide the specialized services needed for Angie A. to regain custody of her daughter.[2] Because the State is not limited in a termination of parental rights case to the grounds found in WIS. STAT. § 48.415(3) when there is an allegation that a parent suffers from mental illness or a developmental disability, the grounds alleged in the petition to terminate her parental rights are lawful. In addition, the evidence adduced at trial supported both grounds found in the petition and the jury's finding that the Bureau made a reasonable effort to provide the services ordered by the court. Thus, the order is affirmed.

Pursuant to WIS. STAT. RULE 809.107(6)(e), this court is required to issue a decision resolving TPR appeals within thirty days after the filing of the reply brief. We may extend that deadline pursuant to WIS. STAT. RULE 809.82(2)(a) upon our own motion or for good cause. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). On our own motion, we now extend the decisional deadline in this matter through the date of this decision.

[2] The actual wording in the brief contains the following argument: "The parental rights of a mentally disabled parent should be terminated where the 'reasonable efforts' applied to purportedly prevent that parent from losing her child are simply not tailored to family preservation in the context of mental illness." (Some capitalization omitted.) This court assumes that Angie meant to write that the parental rights of a mentally disabled parent should *not* be terminated in such a situation.

BACKGROUND

¶2 Alicia A. was born in New Orleans, Louisiana, on May 26, 2009, to Angie A. and her alleged father, Andrew C.[3] Alicia A.'s parents were never married. Alicia A. was Angie A.'s third child. Angie A.'s parental rights to the older children were terminated.

¶3 According to the testimony of Mattie E., Angie A.'s half-sister, several months after Alicia A.'s birth, Angie A. experienced mental health problems and was hospitalized in New Orleans. In September 2009, Mattie E. went to New Orleans after being contacted by the New Orleans child protective services agency and brought both Angie A. and Alicia A. to Milwaukee. Upon returning to Milwaukee, Angie A. and Alicia A. lived with Mattie E. for about one month. During this time Mattie E. cared for Alicia A.'s needs. Angie A. has, in addition to a mental illness, some serious cognitive limitations. Despite these handicaps, Angie A. expressed a desire to have her own place. As a result, Mattie E. and Angie A. found a place for Angie A. and Alicia A. to live, and Angie A. and Alicia A. moved. Mattie E. continued to keep in constant contact with both Angie A. and Alicia A., going to Angie A.'s home to assist in their care multiple times on a daily basis. At some point Mattie E. became concerned for Alicia A.'s well-being because Angie A. was not changing her diapers or feeding her properly. In fact, Angie A. was not properly caring for herself and began urinating on herself. Mattie E. became increasingly concerned about Angie A.'s mental well-being and her fears were confirmed when Angie A. asked Mattie E. to take her to a mental health facility. Mattie E. took her to the hospital, but hours

[3] Andrew C. is not a part of this appeal.

later Angie A. showed up at Mattie E.'s house and told Mattie E. that she, Angie A., planned to take Alicia A. home to her apartment and then she and Alicia A. were going to move to New Orleans. Because Mattie E. had grave concerns for Alicia A.'s safety, she called child protective services.

¶4 A social worker came to the home and various parenting services were offered to Angie A., but after a period of time, Angie A. declined all of the services and told the social worker that they could have Alicia A. Alicia A. was detained and then placed with her aunt. Eventually, Angie A. moved back to New Orleans where she has resided throughout these proceedings. Mattie E. continued to have phone contact with Angie A.; however, Angie A. sometimes threatened Mattie E., which resulted in Mattie E. asking Angie A. not to call her. Mattie E. also said that during some of the phone calls she suspected that Angie A. was not taking her medication. Mattie E. testified that Angie A. sent no gifts or letters to Alicia A., and never asked about Alicia A.'s medical appointments or her day care. Angie A. has also never given any money to Mattie E. for Alicia A.'s support. Mattie E. also recalled that when Angie A. would come back for court proceedings, she would hear from Angie A. and would need to transport her, and occasionally, to feed her.

¶5 An order for temporary physical custody of Alicia A. and placement of Alicia A. with Mattie E. was entered on December 21, 2009. On July 26, 2010, a Children's Court Judge entered a CHIPS order[4] finding that Angie A. had "neglect[ed], refus[ed] or [was] unable" to care for Alicia A. In this order the judge entered certain conditions that Angie A. had to meet in order to obtain

[4] CHIPS is an acronym for "Child in Need of Protection or Services."

custody of Alicia A. (e.g., "All parents must maintain a relationship with [their] child/ren by regularly participating in successful visitation with the child/ren unless the parent's visits are limited by the court."), and the judge ordered the following services to be provided by the Bureau: (1) a mental health assessment, psychological evaluation, and psychiatric services; (2) parenting education, a parenting assistant, and supervised visitation; and (3) a nurturing program.

¶6 Following the dispositional order, Angie A. remained in New Orleans, but she did travel back to Milwaukee for court proceedings and supervised visits with Alicia A. after the Bureau made the arrangements and paid the expenses. There were, however, periods of time between when Angie A. initially moved back to New Orleans and the CHIPS proceeding held on July 26, 2010, when Angie A. had no contact with either the Bureau or Mattie E.

¶7 Approximately six months after the entry of the dispositional order where Alicia A. was found to be a child in need of protection or services (CHIPS), a petition for the termination of Angie A.'s parental rights to Alicia A. was filed. The petition alleged that Alicia A. was continually in need of protection or services and that Angie A. had failed to assume parental responsibility.

¶8 A jury trial was held in November 2011, during which the following witnesses were called by the State: Mattie E.; Yvonne Wilson, a social worker from Safety Services who was involved with the family early on; Kate Goedtel, the case worker for Angie A. and Alicia A.; and Dr. Michelle Iyamah, a clinical psychologist who evaluated Angie A. and also observed her with Alicia A.

¶9 During her testimony, Mattie E. described the events that led to her going to New Orleans to pick up Alicia A. and Angie A. and move to Milwaukee. She explained that she signed Angie A. out of a mental hospital and a social

worker delivered Alicia A. to her and all three came back to Milwaukee. She also described the circumstances that led her to call child protective services and the placement of Alicia A. with her.

¶10 Yvonne Wilson, a witness from Safety Services, also testified at the jury trial. She explained that Safety Services is an agency working under the Bureau which insures child safety within the home of the parents. Safety Services provides services within the home so that a parent can keep the child safe within the home. It is a way of avoiding litigation in court. She explained that the service is voluntary. Wilson testified that she began working with Angie A. when there was some concern raised when Angie A. wanted to take Alicia A. back to New Orleans. In reviewing the notes of her agency, she determined that parenting services and home management services would have been appropriate for Angie A. Wilson also said that had Angie A. wanted their services, a specialized parenting assistant who works with people with special needs would have been provided. However, the reports reflected that Angie A. had some trouble understanding the program and Angie A. herself admitted that she did not know how to care for Alicia A. The reports also stated that Angie A. had been diagnosed as being mentally retarded and suffering from schizophrenia. At a later meeting when Safety Services was going to discuss the services being offered to Angie A., Angie A. told them she did not want to care for Alicia A. and that they should take her. Because Angie A. requested that Alicia A. be taken, no parenting services or home management services were ever started.

¶11 Kate Goedtel, Angie A. and Alicia A.'s case worker, also testified. She explained that her position requires training in a great number of different areas, including mental health issues. She said that she had multiple clients with mental health issues and twenty- to thirty-percent of her clients had a cognitive

delay. Goedtel told the jury that she has had many successful conversations with cognitively-challenged clients, and in dealing with Angie A. she used these skills and went through the court order with her over twenty-five times because of Angie A.'s poor reading skills. She stated that she repeatedly explained to Angie A. what she needed to do with regard to completing psychiatric services and a parenting course. Goedtel also said that she told Angie A. that by not living in Milwaukee, visitation would be severely limited, and that not all of their services were available to Angie A. because often services available in Milwaukee are not offered in other communities. She noted that Angie A. did not seem concerned about these problems. She testified that she contacted a program in New Orleans called "Healthy Start" and Angie A. had been in contact with a woman in the program. Goedtel also contacted Angie A.'s psychiatrist in New Orleans. Goedtel said that her conversations with Angie A.'s doctor revealed that Angie A. refused to take her prescribed medication, and as a result, she was hospitalized in March or April 2010 and again in the summer of 2010. She further recounted how the Bureau had made arrangements for Angie A. to return to Milwaukee for the court proceedings and for visitation with Alicia A.

¶12 Goedtel was also involved in the visitation of Angie A. with Alicia A. In her opinion, Angie A. "didn't seem she knew how to interact with a toddler." She observed that Alicia A. was very fearful of Angie A.

¶13 With respect to the conditions of return set by the judge who proceeded over the CHIPS proceeding, Goedtel testified that, concerning the condition which reads: "All parents must maintain a relationship with [their] child/ren by regularly participating in successful visitation with the child/ren unless the parent's visits are limited by the court," Angie A. did not meet that

condition. With regard to another set of conditions placed on her by the judge, which reads:

> All parents must demonstrate an ability and willingness to provide a safe level of care for the child. A safe level of care is described as follows:
>
> 1. The parent demonstrates the ability to have a safe, suitable and stable home.
>
> 2. The parent does not abuse the child(ren) or subject them to the risk of abuse. Note: Your child(ren) are being abused if he/she is hit with cords, belts, sticks or other objects; has/have bruises, cuts, burns, or marks of any kind caused by another person; are having sexual contact with anyone or see sexual activity.
>
> 3. The parent demonstrates they are able and willing to care for the child(ren) and their special needs on a full-time basis.
>
> 4. The parent cooperates effective with others needed to help care for the child(ren).
>
> 5. The parent must cooperate with the BMCW by staying in touch with their ongoing Case Manager, letting the ongoing Case Manager know their address and telephone number, and allowing the ongoing Case Manager into their home to assess the home for safety.

(Some bolding omitted; formatting altered.) Goedtel testified that Angie A. did not meet these conditions. She explained that Angie A.'s address in New Orleans constantly changed and she had no ability to budget her funds. Further, Goedtel testified that Angie A. showed no ability to care for her child nor did she understand her child's needs or what was age-appropriate for Alicia A. As to cooperating effectively to help with the care of the child, Goedtel stated that it "has been a struggle" because Angie A. believes Mattie E. stole her child and makes unfounded accusations against her. Consequently, Angie A. had not cooperated effectively with Alicia A.'s caretaker. Finally, when asked whether Angie A. cooperates with the Bureau, Goedtel said there have been problems with

that condition as well because there were periods when Goedtel had no contact with Angie A. Goedtel testified that she did not think, as Angie A.'s ongoing case manager, that she could have done anything further to assist Angie A. in meeting the conditions of return.

¶14 Dr. Iyamah testified that she evaluated Angie A. on two occasions and conducted a series of tests. She learned that Angie A. dropped out of school after the ninth grade and was in special education classes when in school. Also, she learned that Angie A. had three children, none of whom were living with her. Dr. Iyamah testified that when she met Angie A. she noticed that her hygiene was not good as she wore soiled clothes and had a strong body odor. Angie A. reported that she had been hospitalized for her mental illness numerous times.

¶15 Among the tests given to Angie A., Dr. Iyamah administered the Wechler Intelligence Test and determined that Angie A. had an IQ of 47, which put her in the extremely low category. She explained that a person with that IQ would normally need assistance with their own daily living. When asked whether she would have any concerns about a person with this low IQ parenting a very young child, Dr. Iyamah replied, "[t]he concerns would be vast." She noted that a person with Angie A.'s IQ would not be able to provide a safe environment for a child, and that her deficits would be "pretty all-encompassing" in terms of raising a child. Dr. Iyamah's opinion was that Angie A.'s academic functioning was similar to that of an average five- or six-year-old child.

¶16 Dr. Iyamah administered another test, called the "Street Survival-Skills Questionnaire," which is designed to measure exactly how a person is functioning in their environment. In this test, Angie A. scored a "one" out of a possible "nineteen." According to the doctor, Angie A.'s test scores on this test

were lower than what would be expected and were at the level of moderate mental retardation.

¶17 Dr. Iyamah also evaluated Angie A.'s relationship with Alicia A. First, she observed that Angie A. was unable to accurately give background information concerning Alicia A. At one point, Angie A. told the doctor that Alicia A. weighed 178 pounds when she was born. The doctor also noted that Alicia A. "evidenced fear and distress" when she saw her mother, leading her to believe that there was a "very negative relationship" between Angie A. and Alicia A. Dr. Iyamah also testified that many of Angie A.'s problems are not amenable to change. She explained that: "It had been life-long already. And given her low intellectual, academic, and adoptive functioning, it – it wouldn't be very – there wouldn't be an optimistic approach for making improvements in those areas." In discussing the services that the Bureau might have offered to Angie A., the following exchange occurred:

> Q. [D]o you believe there [are] any services that the Bureau Of Milwaukee Child Welfare could have put into place to help her alleviate some of these concerns that she has with her level of functioning?
>
> ….
>
> A. I – Given the very chronic and severe nature of all the various factors, I didn't feel that there would be much that would be helpful, if anything.
>
> ….
>
> Q. Of all the issues you've presented …. [d]o you think they can be resolved in the next two years?
>
> A. No.

¶18 Finally, when Dr. Iyamah was cross-examined by Angie A.'s attorney, she concluded that "again, with the safety issues and everything involved

that we went over before, I think that it would take a Specialist involved 24/7. And I am not aware of any services that are provided in that manner."

¶19 The jury found that the grounds alleged in the petition for the termination of Angie A.'s parental rights were proven, that the Bureau had made reasonable efforts to provide the services ordered by the court, and later, the judge found that it was in Alicia A.'s best interest to terminate Angie A.'s parental rights. In so determining, the trial court said that Angie A.'s mental limitations had prevented Angie A. from providing the necessary care, comfort, food and services for her child.

ANALYSIS

¶20 Angie A. contends that the Bureau failed to bring a termination of parental rights petition against her under the ground found in WIS. STAT. § 48.415(3), titled "continuing parental disability," a ground that specifically targets parents with a mental illness or a developmental disability, because they could not prove such a ground and instead "shoehorned" her into the grounds found in WIS. STAT. § 48.415(2), which reads: "continuing need of protection and services," and WIS. STAT. § 48.416(6), which reads: "failure to assume parental responsibility." Angie A. argues that, as a result, she was not given the specialized services that she was entitled to.

¶21 As support for this argument, Angie A. cites ***State v. Raymond C.***, 187 Wis. 2d 10, 12, 522 N.W.2d 243 (Ct. App. 1994), which involved a developmentally disabled parent who claimed the passage of the Americans with Disabilities Act (ADA) increased the County's duties to him. There, this court affirmed the trial court's determination that found that the county had made "diligent efforts"—a standard different than that found in the current statute, *see*

WIS. STAT. § 48.415(2)(a)2.b.—and concluded that the ADA did not increase the County's responsibilities, *see* ***Raymond C.***, 187 Wis. 2d at 12. Nothing in this case supports Angie A.'s contention that the Bureau should have brought the termination suit against her under § 48.415(3), nor does it support Angie A.'s argument that the Bureau did not provide her with the proper services. In fact, ***Raymond C.*** supports the State's position, in that the court opined that "the County's efforts to provide Raymond with court-ordered services must be examined in light of Raymond's limitations, including the fact that he could not read." *See* ***id.***, 187 Wis. 2d at 15.

¶22 Angie A. also cites foreign case law and research articles addressing parents with mental illness. These cases and research articles are not binding authority. *See* ***Layton Inv. Co. v. Harris***, 43 Wis. 2d 21, 26 n.4, 168 N.W.2d 70 (1969). Indeed, one such article urges courts not to use parental disability as a ground for termination, something Angie A. is advocating, and instead submits that termination should be "on the basis of specific parental behavior." *See* THE INCLUSION OF DISABILITY AS GROUNDS FOR TERMINATION OF PARENTAL RIGHTS IN STATE CODES, Policy Research Brief, Vol. 17, No. 2, October 2006, at p. 5, Univ. of Minnesota College of Education and Human Development (available at http://ici.umn.edu/products/prb/172, last visited Feb. 11, 2013). Thus, the bases for Angie A.'s arguments are not persuasive and it was appropriate for the State to allege the grounds they did in bringing the termination of parental rights litigation.

¶23 As noted, Angie A. contends that her parental rights to Alicia A. should not have been terminated because the Bureau did not make reasonable

efforts to provide her with services that addressed her mental illness.[5]

¶24 In order to establish the grounds under WIS. STAT. § 48.415(2) for termination of parental rights, the Department must prove the following: (1) the child has been adjudged to be a child in need of protection or services and placed, or continued in a placement, outside his or her home for a total period of six months or longer pursuant to one or more court orders containing the notice required by law; (2) the agency responsible for the care of the child and the family has made a reasonable effort to provide the services ordered by the court; (3) the parent has failed to meet the conditions established for the safe return of the child to the home; and (4) there is a substantial likelihood that the parent will not meet these return conditions within the nine-month period following the fact-finding hearing. *See* ***id.*** The term "reasonable effort" "means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child[,] … the level of cooperation of the parent[,] … and other relevant circumstances of the case." WIS. STAT. § 48.415(2)(a)2.a. These elements must be proved by clear and convincing evidence. *See* WIS. STAT. §§ 48.424(2), 48.31(1).

¶25 The jury was told that the first question on the verdict had been answered by the court. The trial court determined that Alicia A. had been previously adjudged to be a child in need of protection or services who was placed outside the home for over six months pursuant to a court order and that the order

[5] Angie A.'s brief uses the terms "mental illness" and "mentally disabled" interchangeably. However, they are not synonymous and describe different diagnoses. Although unfortunately Angie A. suffers from both, her argument appears to concentrate on her mental illness, not her cognitive delays.

contained the termination of parental rights notice. The jury was asked to answer the second question as to whether the Bureau made a reasonable effort to provide the services ordered by the court. The jury answered "yes."[6] When asked in question three whether Angie A. had failed to meet the conditions established for the safe return of Alicia A., the jury again answered "yes." The jury also found that there was not a substantial likelihood that Angie A. would meet the conditions within nine months. "A jury's verdict must be sustained if there is any credible evidence, when viewed in a light most favorable to the verdict, to support it." ***Sheboygan Cnty. DHHS v. Tanya M.B.***, 2010 WI 55, ¶49, 325 Wis. 2d 524, 785 N.W.2d 369. That test has been easily met here as evidenced by the following testimony, which the jury accepted.

¶26 Mattie E. testified that Angie A. has consistently been unable to care for Alicia A.'s needs and is often unable to care for her own basic needs. Yvonne Wilson related how Safety Services was called in, developed a plan to assist Angie A., including providing a specialized parenting assistant, and how Angie A. decided she could not take care of Alicia A. and asked Safety Services workers to take her. Goedtel explained to the jury that she had experience with clients who were both mentally ill and had cognitive delays, and although she could communicate with Angie A., it was difficult to provide her with many of the services she needed because she elected to move back to New Orleans. In addition, Goedtel stated that Angie A. did not keep in regular contact with her, and

[6] Angie A. is correct that two jurors dissented to this question. However, the agreement of ten jurors was sufficient. *See* WIS. STAT. § 805.09 (A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury."); ***Door Cnty. DHFS v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999) (The rules of civil procedure govern termination-of-parental-rights proceedings.).

that her psychiatrist in New Orleans reported that Angie A. was not taking her medication, which resulted in her hospitalization several times in 2010. Goedtel further testified that there was nothing else that could have been done to assist Angie A. in reaching the condition of return and the Bureau did everything that the court ordered.

¶27 Perhaps the most damaging testimony came from Dr. Iyamah, who did extensive testing of Angie A. and determined that she had an IQ of 47, which equated with Angie A. needing assistance for her own care. Dr. Iyamah was very firm in her expert opinion that Angie A. could never care for a young infant, as she would not be able to provide a safe environment nor tend to a child's basic needs. Further, Dr. Iyamah also expressed a belief that, "Given the very chronic and severe nature of all the various factors, [she] didn't feel that there would be much that would be helpful, if anything," that the Bureau could have provided by way of services.

¶28 In sum, the jury heard ample credible evidence that Angie A. failed to meet the conditions for the return of her daughter and the Bureau made reasonable efforts to provide Angie A. with the court-ordered services, despite her moving out of state. Accordingly, the jury's verdict is affirmed.

¶29 Finally, as to the second ground found by the jury, that Angie A. "fail[ed] to assume parental responsibility," this court declines to address this argument for two reasons. First, having affirmed the jury on the first ground, there is nothing to be gained by addressing the second ground. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we decide cases on the narrowest possible grounds). Second, the only argument concerning the second ground is the following solitary sentence found in Angie A.'s brief: "In addition,

while Angie [A.]'s parental rights were also terminated on the ground of 'failure to assume parental responsibility,' that would be an equally discriminatory basis upon which to boot-strap a TPR case against a mentally disabled parent without the means to connect with her child in the first place." This court declines to address this argument because it is woefully undeveloped. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

By the Court.—Order affirmed.

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