COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1346 **Cir. Ct. No. 2011TP2**

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

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

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

KIMBERLY M. K.,

RESPONDENT,

JESSIE R. R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Affirmed.*

¶1 REILLY, J.[1] Jessie R. R. appeals from the termination of his parental rights to Makayla R. He argues that the injunction terminating his visitation during the proceedings was an erroneous exercise of discretion, that his rights were violated by the failure to timely hold a hearing on the injunction, and that he should be allowed to withdraw his admission that grounds for termination existed. We reject Jessie's arguments and affirm.

Facts

¶2 In July 2009, Makayla was born to Kimberly M. K., the mother of three other children with Jessie. Jessie was adjudicated Makayla's father before Makayla was born. The other children were already in foster care pursuant to CHIPS[2] petitions that imposed conditions of return, including maintaining a safe home for the children and verifying sobriety through periodic drug testing.

¶3 Jessie failed to abide by the conditions imposed in the other children's CHIPS cases. Jessie tested positive for drugs (marijuana), submitted a diluted sample, and frequently missed test appointments. Kimberly also violated her CHIPS conditions but was allowed to bring Makayla home from the hospital. Jessie was living in Racine, first in an efficiency apartment too small for the children and then in an apartment that, though larger, had health department violations making it unsuitable for children. Kimberly would sometimes drop Makayla off with Jessie even though his residence was unsuitable.

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

[2] CHIPS is an acronym for "child in need of protection or services." *See* WIS. STAT. § 48.13 and ***State v. Bobby G.***, 2007 WI 77, ¶8 n.7, 301 Wis. 2d 531, 734 N.W.2d 81.

¶4 In early December 2009, Kimberly, who was living at her mother's home, was asked to move. Kimberly and Makayla moved into a homeless shelter, but they were evicted when Kimberly attempted to falsify a drug test on December 30. Kimberly dropped Makayla off with Jessie. Kimberly thereafter demanded that Jessie return Makayla to her, threatening to call the police to have him arrested on child support warrants. Jessie returned Makayla to Kimberly's care. In mid-January 2010, a caseworker removed Makayla from Kimberly's custody as Kimberly violated her sobriety conditions and failed to provide proper care to Makayla. Jessie also had not complied with his CHIPS conditions and had returned Makayla to Kimberly despite known risks of harm to Makayla. Makayla became the subject of a CHIPS petition and was found to be in need of protective services.

¶5 After Makayla was taken into state custody, Jessie had supervised out-of-home visits with her for an hour or two each week. Evidence reflected that Jessie's home was unsafe for children.

¶6 In February 2011, the Racine County Human Services Department filed a petition for an injunction against future visitation and a petition to terminate Jessie's parental rights. The court immediately issued the injunction ex parte and the hearing on the injunction was delayed until June 2011 due to the substitution of the original judge and difficulties in finding an attorney for Jessie. At the June injunction hearing, the court agreed with the guardian ad litem that visitation should cease.

¶7 On the date scheduled for the phase-one trial, Kimberly and Jessie both entered voluntary waivers agreeing that there was sufficient evidence to establish grounds for termination, namely, failure to assume parental

responsibility. In a lengthy and thorough colloquy, Jessie asserted that he understood what he was doing, had had plenty of time to think it over, was not being pressured, and wished to admit to the grounds and then try to present a stronger case in the second, dispositional phase. In response to questions from the GAL, Jessie explained that just the week before, he had gone through the very same process of admitting the grounds in the CHIPS cases concerning his other daughters. After taking evidence from the caseworker to establish Jessie's failure to assume parental responsibility, the court accepted Jessie's waiver and set a date for the phase-two dispositional hearing.

¶8 The dispositional hearing began in September and was conducted jointly for all of Kimberly's and Jessie's four children. At the hearing, Jessie asked the court to consider the fact that he had been off of drugs for seventy-four days, completed anger management and parenting classes, and had a clean two-bedroom apartment where he could care for the children, though he did not yet have beds for them. He asked the court not to terminate his rights without first giving him another "chance to see ... if I could do it on my own" with his family's help.

¶9 The court terminated Jessie's parental rights as the evidence established that Makayla's best interests would be served by termination.

Analysis

¶10 When a procedural error has occurred in TPR proceedings, an appellate court's duty is to "examine the entire record to determine whether it provides a factual basis to support the court's finding of grounds for termination." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶32, 246 Wis. 2d 1, 629 N.W.2d 768.

Violations of the statutory time limits do not deprive the court of competency to exercise its personal or subject matter jurisdiction. WIS. STAT. § 48.315(3).

¶11 Jessie first argues that the court made a mistake of law when it looked to WIS. STAT. § 48.426 for the standard of what constitutes "best interests" at the injunction hearing and made an erroneous factual decision by granting the injunction. Interpretation of a statute is an issue we review de novo. ***Waukesha Cnty. v. Steven H.***, 2000 WI 28, ¶16, 233 Wis. 2d 344, 607 N.W.2d 607. We will uphold a court's factual decision if it has any basis in the record. *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶32.

¶12 An injunction prohibiting visitation is authorized in involuntary TPR proceedings if the prohibition is in the best interests of the child. WIS. STAT. § 48.42(1m)(c). Section 48.42 does not define "best interests." WISCONSIN STAT. § 48.426(3) addresses the factors to consider in determining the "best interests" of the child in a dispositional hearing. Jessie argues that the court's reference to the § 48.426(3) factors in the injunction proceedings conflicted with case law that there must be a showing of a risk of harm to the child before terminating parent-child visitation. *See, e.g.*, ***Dane Cnty. DHS v. Ponn P.***, 2005 WI 32, 279 Wis. 2d 169, 694 N.W.2d 344; ***Wolfe v. Wolfe***, 2000 WI App 93, 234 Wis. 2d 449, 610 N.W.2d 222.

¶13 The court did not err in considering, in part, the "best interest" factors set forth in WIS. STAT. § 48.426 at the injunction hearing. The court's discussion of Jessie's lengthy struggle with his addiction to marijuana and his failure to maintain an appropriate residence where Makayla could visit makes clear that the risk of harm to Makayla was integral to the court's analysis. The agency removed Makayla from her parents' care in the first place due to the

harmful situations to which Makayla was exposed. *See* ***Ponn P.***, 279 Wis. 2d 169, ¶¶30-31. The risk of harm to Makayla was clearly the premise of the court's prohibition on visitation, and any error in considering the factors in § 48.426 was harmless.

¶14 In his second challenge, Jessie argues that the four-month delay before the court held a hearing on the ex parte injunction, and the subsequent issuance of the injunction, violated his procedural and substantive due process rights. Any error[3] was waived as Jessie never objected to the delay, *see* WIS. STAT. § 48.315(3), and the delay, even had there been an objection, was not prejudicial as it did not affect Jessie's substantive interests. Jessie never proved that he could provide a safe home for Makayla to live in, or even visit, and failed to meet the conditions set by the court. In view of Jessie's failure to assume a parental role, and his ongoing failure to comply with the conditions of return, any error in the timing of the hearing was waived by Jessie and was harmless. The injunction was proper.

¶15 Finally, we reject Jessie's request to withdraw his admission that grounds for termination existed. The record amply supports both the grounds for termination, as already described, and that Jessie's waiver was knowing, voluntary, and intelligent. Jessie's trial lawyer testified in the postdisposition hearing about his discussions with Jessie of the precise difference between the two phases of TPR proceedings and of the benefit of conceding the grounds and

[3] While an injunction under WIS. STAT. § 48.42(1m) may initially be issued ex parte, "[t]he court shall hold a hearing on the issuance of an injunction on or before the date of the hearing on the petition to terminate parental rights under [WIS. STAT. §] 48.422(1)." Sec. 48.42(1m)(b). The hearing under § 48.422(1) "shall be held within 30 days" after filing.

buying time to attempt to improve his situation enough to persuade the court to allow him to keep Makayla. We accept the circuit court's finding that Jessie's postdisposition testimony that he did not understand what he was doing when he waived the phase-one hearing lacked credibility. The fact that the strategy Jessie chose to follow failed does not provide grounds to withdraw his waiver of the phase-one trial.

By the Court.—Order affirmed.

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