COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP318 **Cir. Ct. No. 2012TP13**

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

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

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DAVID W. J.,

RESPONDENT,

DEBRA S. A.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Kenosha County: CHAD G. KERKMAN, Judge. *Affirmed*.

¶1 REILLY, J.[1] Debra S. A. appeals from an order terminating her parental rights to her daughter, Kayla J. T., and an order denying postdispositional relief. She challenges the evidence presented during a fact-finding hearing where the court adjudged Debra as an unfit parent. Debra argues that the court's determination that she is an unfit parent was based on the improper admission of expert witness testimony and that there was insufficient evidence to support the court's decision. We reject these arguments and affirm.

BACKGROUND

¶2 Kayla was placed outside of Debra's home on January 7, 2008, pursuant to a court order after she was found to be a child in need of protection or services. The order required Debra to meet a number of conditions before Kayla could safely be returned home. Over four years later, on February 22, 2012, the County filed a petition to terminate Debra's parental rights to Kayla on the grounds that Debra had failed to meet the conditions required for the safe return of Kayla to Debra and there was a substantial likelihood that Debra would not meet the required conditions within nine months of the fact-finding hearing.

¶3 Following a fact-finding hearing, the court found that Debra had not met the conditions for safe return of Kayla over the previous four years and that Kayla was in continuing need of protection or services. Specifically, the court found that Debra had not met conditions requiring that she successfully complete her parenting program, demonstrate appropriate parenting skills, or "work[] through" her mental health and childhood maltreatment issues. The court found

[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.

that Debra would not meet the conditions for the safe return of Kayla within the next nine months based on Debra's prior lack of engagement with the services provided by the County and her unwillingness to deal with her mental health and parenting issues. Debra was determined to be an unfit parent, and following a dispositional hearing, her parental rights to Kayla were terminated.

¶4 Debra subsequently moved to vacate the termination order by arguing that her trial counsel was ineffective for failing to object to expert testimony by the County's social worker and failing to use interrogatories and depositions to establish Debra had met the conditions for a safe return. Debra also argued that the evidence was insufficient to establish that she had not met and would not meet the conditions for a safe return within nine months of the fact-finding hearing. The court held an evidentiary hearing and found that trial counsel was not ineffective and that there were sufficient facts to support the finding that Debra would not meet the conditions for safe return within nine months of the fact-finding hearing. Debra appeals. Further facts will be included below as necessary.

DISCUSSION

¶5 To establish the ground necessary for the involuntary termination of parental rights due to a child's continuing need for protection or services under WIS. STAT. § 48.415(2), the petitioner needs to prove four elements with clear and convincing evidence. ***Walworth Cnty. DHHS v. Andrea L.O.***, 2008 WI 46, ¶¶5-6, 309 Wis. 2d 161, 749 N.W.2d 168. Prior to the fact-finding hearing, Debra stipulated to two of the elements: (1) that Kayla had been found in need of protection or services and placed outside her home for a cumulative total period of six months or longer (i.e., four years in Kayla's case) pursuant to one or more

court orders containing appropriate notice and (2) that the County had made a reasonable effort to provide court-ordered services. That left two elements for the County to prove at the fact-finding hearing: (1) that Debra had failed to meet the conditions established for the safe return of Kayla to Debra's home and (2) that there was a substantial likelihood that Debra would not meet the conditions of safe return for Kayla within the nine-month period following the conclusion of the fact-finding hearing. *See* ***id.***; *see also* § 48.415(2)(a)3.

¶6 Debra challenges the evidence relied upon by the court in its finding that the County had established that she had failed to meet the conditions for Kayla's safe return and would not meet the conditions within nine months of the fact-finding hearing. Debra argues that the court erred in allowing the admission of expert witness testimony by a County social worker and lacked sufficient evidence to support its conclusion.

Expert Witness Testimony

¶7 During the fact-finding hearing, a social worker testified "I don't think she will" in response to the following question: "[D]o you have an opinion as to whether or not you think [Debra] will be meeting the conditions set forth for the return of Kayla to her home in the next nine months?" Debra's trial counsel did not object to the testimony. On appeal, Debra argues that the social worker's opinion on the likelihood of Debra meeting the conditions for return was inadmissible expert testimony. We need not address the merits of this argument.

¶8 Debra cannot directly appeal the admission of the social worker's testimony because she forfeited this issue when trial counsel failed to object to the testimony. Forfeiture occurs when a party fails to make a timely assertion of a right. ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612.

Unlike rights subject to waiver, forfeitable rights do not require intentional relinquishment. ***Id.*** Certain rights are forfeitable because their "relinquishment will not necessarily deprive a party of a fair trial" and the assertion of those rights is best left to the immediacy of the trial, such as when a party raises an evidentiary objection. ***State v. Soto***, 2012 WI 93, ¶36, 343 Wis. 2d 43, 817 N.W.2d 848. Whether an expert may testify is a rule of evidence, *see* WIS. STAT. § 907.02, and thus subject to forfeiture when not objected to promptly with a statement of the exact grounds of the objection, *see* WIS. STAT. § 901.03(1)(a). As Debra did not make a timely objection, she forfeited the evidentiary issue of whether the social worker provided inadmissible expert testimony.

¶9 During a postdispositional ***Machner*** hearing,[2] the circuit court found that the social worker's testimony was admissible expert testimony. If Debra wanted to contest this finding she should have appealed the circuit court's postdispositional ruling that her trial counsel did not provide ineffective assistance of counsel. As Debra did not argue this issue in her brief-in-chief, she has abandoned an ineffective assistance of counsel claim.[3] It is well-established appellate practice that issues not argued will not be considered or decided. ***Riley v. Hamilton***, 153 Wis. 2d 582, 588, 451 N.W.2d 454 (Ct. App. 1989). Debra explicitly states in her brief-in-chief that she "does not press an ineffective assistance of counsel claim" on appeal. Debra also failed to employ the

[2] The circuit court held a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), to determine whether Debra's trial counsel rendered ineffective assistance of counsel.

[3] Even if Debra had successfully asserted her ineffective assistance of counsel claim on appeal, Debra's claim would fail; she was not prejudiced by the social worker's testimony. *See* ***Strickland v. Washington***, 466 U.S. 668, 691-92 (1984).

ineffective assistance of counsel test under ***Strickland v. Washington***, 466 U.S. 668 (1984). A party does not adequately raise an issue when it does not argue that issue in the brief-in-chief. ***Adler v. D & H Indus., Inc.***, 2005 WI App 43, ¶18, 279 Wis. 2d 472, 694 N.W.2d 480. Debra cannot revive her abandoned claim in her reply brief as we will not consider issues raised for the first time in a reply brief. ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

Sufficiency of the Evidence

¶10 Debra argues that there was insufficient evidence at the fact-finding hearing to support the court's findings that Debra had failed to meet the conditions for return and that there was a substantial likelihood she would not meet the conditions within the following nine months. When reviewing a sufficiency of the evidence challenge, we employ a highly deferential standard of review. ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We will not overturn a verdict if there is any credible evidence, under any reasonable view, that leads to an inference supporting the verdict, and we consider the evidence in a light most favorable to the verdict. ***Id.***, ¶¶38-39. We will search the record for credible evidence that sustains the verdict. ***Id.***, ¶39. Debra's sufficiency of the evidence challenge fails as there is credible evidence in the record to support the court's findings.

¶11 Among the conditions for safe return were requirements that Debra actively participate in mental health services and successfully complete and demonstrate an understanding of the principles taught in a parenting program. Evidence at the fact-finding hearing permitted the trier of fact to conclude that Debra had not complied with these conditions. Debra initially refused to attend

mental health counseling sessions, and while she eventually complied, she later refused to attend for extended periods of time. Debra testified that she believes therapy is ineffective and that she is forced to attend. Debra also does not take her medication on a regular basis**,** frequently misplaces her medication, and runs out of medication with no plan of having her prescription refilled as she fails to make appointments with her psychiatrist. Additionally, although Debra completed the bookwork portion of the parenting classes, the parent educator working with Debra testified that the completion of the bookwork did not mean that Debra had successfully completed the parenting program. The parent educator explained that Debra did not grasp important parenting concepts after the bookwork portion of the program was completed. There was sufficient, credible evidence supporting the court's finding that Debra did not meet the mental health and parenting conditions for Kayla's safe return.

¶12 Evidence in the record also supports the court's finding that there was a substantial probability that Debra would not actively participate in mental health services or successfully complete the parenting program within nine months. Debra attended counseling sporadically, and when she did attend, she refused to address the mental health issues that affect her ability to parent. A caseworker familiar with Debra's poor efforts to address her mental health issues testified that she did not believe Debra would address her mental health issues within nine months. The parent educator testified that she and Debra spent two and one-half years on a parenting program designed for, at most, twelve weeks. During this time, Debra completed only the bookwork portion of the program and failed to demonstrate effective parenting skills. The record sufficiently contains evidence that there was a substantial likelihood that Debra would not meet these

conditions for the safe return of Kayla within nine months, especially in light of her inability to meet the conditions over the previous four years.

By the Court.—Orders affirmed.

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