COURT OF APPEALS DECISION DATED AND FILED

February 2, 2012

A. John Voelker
Acting 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. 2011AP2748

Cir. Ct. No. 2011TP23

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

KEVIN D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: PETER ANDERSON, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Kevin D. appeals an order of the circuit court terminating his parental rights to Nevaeh D. Kevin contends that his due process rights were violated when factual assertions in Dane County Department of Human Services' requests for admissions were deemed admitted due to his failure to respond timely to those requests. He also contends that the circuit court erroneously exercised its discretion by denying his motion to withdraw the deemed admissions. I affirm.

BACKGROUND

¶2 On March 9, 2011, the County filed a petition seeking the involuntary termination of Kevin D.'s parental rights to Nevaeh on the basis of abandonment. *See* WIS. STAT. § 48.415.(1)(a)2. In May 2011, discovery requests, including requests for admissions, were served upon Kevin through his attorney. Approximately two weeks after the discovery requests were received by Kevin's attorney, Kevin's attorney went to meet Kevin at the Dane County jail, where Kevin had been incarcerated when Kevin's attorney had met with him on two prior occasions. However, when Kevin's attorney arrived at the jail, he learned that Kevin had been released. Kevin's attorney attempted to locate Kevin and eventually mailed Kevin a copy of the request for admissions to the residence of Kevin's grandmother, where Kevin was staying. Kevin later acknowledged receipt of the requests for admissions.

¶3 On May 2, 2011, Kevin entered a denial to the allegations in the petition. At that time, the County stated on the record that it agreed to allow

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

Kevin sixty more days to respond to discovery. The circuit court, however, did not enter an order regarding that extension.

¶4 On July 13, 2011, a status conference was held. At that time, Kevin had not yet responded to the discovery requests, nor had he filed a request to withdraw any deemed admissions. Kevin's attorney, who appeared without Kevin, informed the court that he was having difficulty remaining in contact with Kevin, and that Kevin was not cooperating with discovery. Kevin's attorney averred that from May 2, 2011, through July 13, he had neither heard from nor seen Kevin, despite attempts by him to get in touch with Kevin.

¶5 Following the July 13, 2011 status conference, the court ordered that by July 25, 2011, Kevin needed to "ask for leave to vacate his earlier nonresponse" and file his written responses to the request for admissions. The court stated that if Kevin did not do so, the County could then move for summary judgment based on the admissions.

¶6 Kevin did not file a motion to withdraw deemed admissions to the County's request for admissions by the court's deadline, and on July 27, 2011, the County moved for partial summary judgment on the issue of abandonment. On July 29, Kevin's attorney filed with the County Kevin's answers to the County's requests for admissions,[2] and on August 5, filed a motion entitled "motion for an enlargement of time to file response to request for admissions."

[2] Kevin's attorney averred that on July 20, 2011, Kevin informed him that he no longer wished to contest the termination of his parental rights to Nevaeh. However, on July 27, Kevin notified him that he had changed his mind and wished to contest the case.

¶7 The court treated Kevin's motion as one to withdraw deemed admissions, explaining that the requests for admissions were deemed admitted due to Kevin's failure to respond to the request for admissions in the time required by law. The court found that the motion was not timely and that there was no excusable neglect for the belatedness of the order. The court also stated that allowing Kevin to withdraw the deemed admissions would be prejudicial to the County due to the proximity of the scheduled trial, as well as prejudicial to Nevaeh in that it would interfere with her ability to obtain permanence. Accordingly, the court denied Kevin's motion. Following the denial of Kevin's motion, the court then granted the County's motion for summary judgment on the issue of abandonment and declared Kevin to be unfit.

¶8 A dispositional hearing was held on September 2, 2011, at which time the court found that termination of Kevin's parental rights to Nevaeh was in Nevaeh's best interest. The court then entered an order terminating Kevin's parental rights to Nevaeh. Kevin appeals.

DISCUSSION

¶9 Kevin contends on appeal that the circuit court erred in granting summary judgment in favor of the County on the issue of whether grounds existed for termination. His arguments are two-fold. First, he argues that the establishment of the grounds for termination on the basis of deemed admissions under WIS. STAT. § 804.11(2) was a violation of his due process rights. Second, he argues that the court should have allowed him to withdraw his deemed admissions.

A. Due Process

¶10 "A parent's interest in the parent-child relationship and in the care, custody, and management of his or her child is recognized as a fundamental liberty interest protected by the Fourteenth Amendment." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶22, 271 Wis. 2d 1, 678 N.W.2d 856. When the State moves to destroy weakened familial bonds, due process requires that it must provide the parents with fundamentally fair procedures. ***Id.***, ¶23.

¶11 In Wisconsin, the procedure for the involuntary termination of parental rights is two-part. In the first part, the grounds phase, the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist. WIS. STAT. § 48.31(1); ***id.***, ¶24. If all the elements of a statutory ground have been established, the circuit court must find the parent unfit. ***Steven V.***, 271 Wis. 2d 1, ¶25. In the second part, the dispositional phase, the court must decide whether termination of the parent's rights is in the best interest of the child. ***Id.***, ¶27; WIS. STAT. § 48.426(2).

¶12 Here, the concern is with the grounds, or unfitness, phase of the TPR case. Specifically, whether the application of the procedure in WIS. STAT. § 804.11(1)(b) that requests for admissions will be deemed admitted if the party to whom the request is directed fails to timely serve a written answer or objection upon the party requesting the admission, violates the due process rights of an objecting parent in a TPR proceeding.

¶13 WISCONSIN STAT. § 804.11(1)(b), which addresses requests for admissions, provides that "[e]ach matter of which an admission is requested … is admitted unless, within 30 days after service of the request, or within such shorter

or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter …." In 1995, the legislature amended WIS. STAT. § 48.293, to provide that "the discovery procedures permitted under ch. 804 shall apply to all" ch. 48 proceedings. 1995 Wis. Act 275, §43.

¶14 Kevin asserts in conclusory fashion that when facts were deemed admitted under WIS. STAT. § 804.11(1)(b) in the grounds phase of this TPR proceeding, his due process rights were violated because those facts were deemed admitted as a matter of law without the benefit of a hearing on those facts. Kevin has not developed this argument, and I do not consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (an appellate court need not address undeveloped arguments); ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.")

¶15 Kevin also asserts that his due process rights were violated by virtue of the application of WIS. STAT. § 804.11(1)(b) because he was not provided "the requisite notice that due process requires" of the consequence of not timely responding to the requests for admission. He claims that although the requests for admission provided by the County stated that "[a] failure to specifically deny any statement within thirty (30) days will be deemed an admission pursuant to [WIS. STAT. §] 804.11(b)," he was not provided "notice, [an] explanation or instruction as to what the phrase 'will be deemed an admission' meant," which he maintains due process requires "before grounds may be established by operation of law." Kevin did not raise this argument, or in fact any due process argument below. This court generally does not consider issues raised for the first time on appeal. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992).

Moreover, the words "deemed" and "admission" are ordinary, non-technical words. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 28, 589 (1993) (defining "admission" as "an act of admitting: the fact of being admitted" and defining "deem" as "to come to view, judge, or classify after some reflection"); BLACK'S LAW DICTIONARY 53, 477-78 (9th ed. 2009) (defining "admission" as "an acknowledgment that facts are true" and defining "deem" as "to consider, think, or judge"). Kevin fails to cite to any legal authority suggesting that a court must predict which common words a litigant might not understand, and explain their meaning. Nor has Kevin cited to any legal authority suggesting that a court must explain to a litigant the meaning of the term "will be deemed an admission," to ensure that the litigant understands the consequence of failing to respond to requests for admissions, especially in light of the clear statutory language that requests for admissions are "admitted" unless responded to or objected to within 30 days.

B. Withdrawal of Deemed Admissions

¶16 WISCONSIN STAT. § 804.11(2) permits, but does not require, a circuit court to allow a litigant to withdraw deemed admissions if the following two requirements are met: (1) the "presentation of the merits of the action will be subserved"; and (2) the party who obtained the admission must not be prejudiced by the withdrawal. ***Luckett v. Bodner***, 2009 WI 68, ¶30, 318 Wis. 2d 423, 769 N.W.2d 504. *Both* factors must be satisfied for the withdrawal of admissions to be permitted.

¶17 A circuit court's decision to allow or not allow the withdrawal of admissions under WIS. STAT. § 804.11 is discretionary. ***Id.***, ¶31. To determine whether discretion has been properly exercised, we look to whether the relevant

facts have been examined, whether the proper standard of law has been applied, and whether, using a demonstrated rational process, the decisionmaker has reached a conclusion that a reasonable decisionmaker could reach. *See* ***Flottmeyer v. Circuit Court for Monroe County***, 2007 WI App 36, ¶17, 300 Wis. 2d 447, 730 N.W.2d 421. "We will not reverse a discretionary determination ... if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

¶18 Kevin contends that the circuit court erroneously exercised its discretion when it denied his request to withdraw the deemed admissions because the court failed to consider the statutory factors set forth in WIS. STAT. § 804.11(2). Kevin has not directed this court to any legal authority specifically holding that a proper exercise of discretion under § 804.11 requires an analysis of the statutory factors in subsection (2). However, case law suggests that a proper exercise of discretion under § 804.11 requires an analysis of the statutory factors in subsection 2. *See, e.g.,* ***Luckett***, 318 Wis. 2d 423, ¶30-70; ***Rivera v. Perez***, 2010 WI App 91, ¶9, 327 Wis. 2d 467, 787 N.W.2d 882; ***Mucek v. Nationwide Comms., Inc.***, 2002 WI App 60, ¶¶24-33, 252 Wis. 2d 426, 643 N.W.2d 98. Accordingly, I will assume without deciding that a proper exercise of discretion under § 804.11 requires an analysis of both the statutory factors in subsection 2. Thus, the issue of erroneous exercise of discretion in not allowing Kevin to withdraw the admissions turns on whether the circuit court applied the proper standard of law.

¶19 Kevin argues that the circuit court erroneously exercised its discretion in denying his request to withdraw his admission because the court failed to consider the first requirement of WIS. STAT. § 804.11(2), whether "the

presentation of the merits of the action will be subserved thereby," and instead improperly applied an excusable neglect standard. Kevin also argues that the court erred in concluding that the County would be prejudiced if Kevin was allowed to withdraw his admissions because the evidence presented did not show that the County would suffer any prejudice. More specifically, he argues that there was no evidence that the "County had to procure evidence which [] had become impossible or difficult to obtain." The County still had an additional thirty days to prepare for trial, and the record did not demonstrate any "protracted delays" in the grounds phase of the TPR proceeding.

¶20 I will assume for the sake of argument, but not decide, that Kevin is correct that the circuit court in this case did not properly apply the correct legal standard when analyzing the first factor in WIS. STAT. § 804.11(2).[3] However, I conclude that the record supports the court's finding that the County would be prejudiced by the withdrawal of the admissions, the second required factor.

¶21 The prejudice contemplated in the context of WIS. STAT. § 804.11(2) is not merely that the opposing party may suffer injury, damage or detriment if admissions under WIS. STAT. § 804.11 are allowed to be withdrawn. Rather, it is that "the party benefiting from the admission must show prejudice in addition to the inherent consequence that the party will now have to prove something that would have been deemed conclusively established if the opposing party were held to [his or her] admissions." ***Mucek***, 252 Wis. 2d 426, ¶30.

[3] The circuit court in this case stated that Kevin bore the burden of establishing "excusable neglect" for his failure to timely respond to the requests for admissions. The supreme court rejected this standard in ***Luckett v. Bodner***, 2009 WI 68, ¶71, 318 Wis. 2d 423, 769 N.W.2d 504 ("Section 804.11(2) does not … make 'excusable neglect' a prerequisite for withdrawal or amendment of an admission.")

¶22 In determining prejudice under WIS. STAT. § 804.11(2), a court may consider a party's history of discovery abuses. ***Id.***, ¶28. The record is clear in the present case that Kevin failed to cooperate with discovery until after the court's final deadline for discovery and after the County moved for summary judgment based in part on Kevin's failure to comply with discovery. "A party's ongoing failure to provide documents and information will frequently magnify the importance of requests for admissions precisely because the requesting party has already been deprived of requested information and is all the more dependent on admissions to identify what is actually in dispute." ***Id.***, ¶31. As in ***Mucek***, Kevin's complete failure to cooperate by not responding to interrogatories or requests for documents meant that Kevin's failure to respond to requests for admissions left the County in the dark regarding what exactly Kevin was willing to admit. When Kevin finally responded to the County's requests for admissions, it was too late to cure the harm because of all the time and money expended by the County preparing for trial. *See, e.g.,* ***id.***, ¶32. Accordingly, I conclude that the second requirement of § 804.11(2)0—that the party who obtained the admission must not be prejudiced by the withdrawal—has not been satisfied. Because both factors of § 804.11(2) must be met in order for a circuit court to have discretion to allow the withdrawal of admissions, but were not in this case, I conclude that the denial of Kevin's request to withdraw admissions was proper.

¶23 However, even if Kevin's history of discovery abuse was not a proper consideration under WIS. STAT. § 804.11(2), and even if both conditions in subsection (2) have been established by the record, my conclusion that the court did not erroneously exercise its discretion in denying Kevin's motion to withdraw admission would be the same.

¶24 In ***Mucek***, this court explained that even if the two conditions set forth in subsection (2) are met, a circuit court is not required to permit withdrawal under WIS. STAT. § 804.11. ***Id.***, ¶34. The withdrawal of admissions under § 804.11 remains at all times a discretionary decision for the circuit court. ***Id.*** This court went on to state in ***Mucek*** that a circuit court's "general authority to maintain the orderly and prompt processing of cases provides authority to deny withdrawal, apart from the two factors in WIS. STAT. § 804.11(2)." ***Id.***, ¶35. We concluded that in light of the defendant's "egregious" conduct, which included a continual failure to cooperate with discovery and with his own counsel, and a failure to cooperate after being sanctioned, denial of the defendant's motion to withdraw admissions, irrespective of the § 804.11(2) factors, was within the circuit court's discretion. ***Id.***, ¶36.

¶25 I reach the same conclusions here. Throughout the pendency of the TPR proceeding, Kevin continually failed to cooperate with discovery and with his own counsel. He was given multiple extensions to respond to discovery and ample opportunity to do so. However, despite warnings by the court and multiple attempts by his counsel to reach him, Kevin continued with his lack of cooperation. The circuit court found that there was not an excusable basis for Kevin's lack of cooperation, and Kevin has provided no basis for me to find otherwise.

¶26 Accordingly, I conclude that the circuit court did not erroneously exercise its discretion when it denied Kevin's request to withdraw his admissions.

CONCLUSION

¶27 For the reasons discussed above, I affirm.

By the Court.—Order affirmed.

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