COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP454 **Cir. Ct. No. 2010TP340**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ELIZABETH M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Elizabeth M. appeals from the trial court's order terminating her parental rights (TPR) to John G., arguing that the trial court improperly exercised its discretion in finding that termination was in John G.'s best interests. Because the record conclusively demonstrates that the trial court properly exercised its discretion, we affirm.

BACKGROUND

¶2 John G. was born to Elizabeth M. in a Milwaukee hospital on April 30, 2009. His father is unknown.[2] At the time of John G.'s birth, Elizabeth M. had lived in Milwaukee for approximately one year. John G. was detained by the Bureau of Milwaukee Child Welfare (BMCW) right after his birth and placed in the foster home of Melissa F., where he is still living. John G.'s foster care placement was necessary because there was an open warrant in Iowa for Elizabeth M.'s arrest.

¶3 Elizabeth M. was extradited to Iowa on a theft charge and has stayed there since. Upon her return to Iowa, she was placed in a residential correctional facility in Iowa and then on probation. Elizabeth M. also had a child-protective-services history in both Iowa and Illinois. At the time of the dispositional hearing, she was living in her residence in Iowa with the father of her two youngest children, who were one year old and one month old respectively. Elizabeth M. also has three older children, ages seven, six and five. A BMCW case worker

[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.

[2] John G.'s unknown father's parental rights were also terminated on October 31, 2011, and are not at issue in this appeal.

testified that the older children are in the custody of their father and that Elizabeth M.'s parental rights to one of the children had been terminated. However, Elizabeth M. contends that all of the older children were returned to her home two days prior to the factfinding hearing and that she will be caring for them half time.

¶4 John G. was found to be a child in need of protection or services (CHIPS) on August 7, 2009. While the CHIPS case was open, a BMCW case worker tried to find relatives in Iowa to care for John G. The case worker investigated both Elizabeth M.'s aunt and sister. After talking to the aunt and conducting an investigation, the case worker started the legal process to place John G. outside Wisconsin, only to be thwarted by the aunt's lack of cooperation. Next, BMCW tried to get approval for placement with Elizabeth M.'s sister but that too failed due to the sister's criminal and child-protective-services history, her housing and general financial situation.

¶5 While Elizabeth M. was in the residential correctional facility in Iowa, she took nurturing classes and completed an alcohol and drug assessment. She also attended a program to get her high school degree. However, Elizabeth M. failed to attend a scheduled psychological evaluation and psychiatrist appointments, and she failed to participate in drug testing through her probation agent as she was required to do.

¶6 On December 15, 2010, the State filed a petition to terminate Elizabeth M.'s parental rights to John G. After several hearings, on July 13, 2011, the date set for jury trial, Elizabeth M. appeared by telephone but her attorney appeared in person. The court was unable to hold the trial that day due to a conflict with another trial. Time limits were tolled for good cause and a new jury

trial date was set for October 31, 2011. Shortly before the new jury trial date, on October 17, 2011, Elizabeth M.'s attorney advised the court via email that Elizabeth M. wished to waive her right to a trial for the factfinding phase and to proceed to disposition. Elizabeth M. requested to appear by telephone at the dispositional hearing.

¶7 On October 31, 2011, the day of the jury trial, Elizabeth M. appeared by phone and her attorney appeared in person. Elizabeth M. again told the court that she wished to waive her right to a trial and she wished to stipulate that legal grounds existed to terminate her parental rights to John G. The trial court accepted the stipulation, found that a legal ground existed, to wit, failure to assume parental responsibility, and also found that Elizabeth M. was unfit.

¶8 The trial court then proceeded with the dispositional contest at which both sides called witnesses and made arguments. The court ruled that it was in John G.'s best interests to terminate Elizabeth M.'s parental rights. Custody of John G. was transferred to BMCW for the purpose of adoption and this appeal followed.

DISCUSSION

¶9 Elizabeth M. argues that the trial court improperly exercised its discretion when it determined that it was in John G.'s best interests to terminate her parental rights. The State and guardian ad litem (GAL) argue that the record shows that the trial court examined all of the relevant statutory factors and properly applied them to the facts in the record before coming to its conclusion. We agree with the State and GAL.

¶10 A TPR proceeding is a two-step process. ***Steven V. v. Kelley H.***, 2003 WI App 110, ¶18, 263 Wis. 2d 241, 663 N.W.2d 817. "[T]he first step is a fact-finding hearing to determine whether grounds exist, and the second step is the dispositional hearing." ***Id.*** Elizabeth M. does not dispute that she stipulated that a legal ground existed to terminate her parental rights at the factfinding phase or that the trial court properly entered a finding that she was unfit. Consequently, only the dispositional stage is at issue on appeal.

¶11 At the dispositional stage, the trial court determines whether termination of a parent's rights is in the child's best interests. WIS. STAT. § 48.426(2). Whether circumstances warrant termination of parental rights is within the trial court's discretion, and we will not reversed the trial court if the court applied the relevant facts to the correct legal standard in a reasonable way. ***David S. v. Laura S.***, 179 Wis. 2d 114, 149-50, 507 N.W.2d 94 (1993). Whether the trial court applied the correct legal standard is a question we independently review. *See* ***Kerkvliet v. Kerkvliet***, 166 Wis. 2d 930, 939, 480 N.W.2d 823 (Ct. App. 1992), *superseded by statute on other grounds by* WIS. STAT. § 767.327(3) (2001-02).

¶12 Elizabeth M. argues that the trial court erroneously exercised its discretion when it concluded that it was in John G.'s best interests to terminate her parental rights because John G. was removed from her custody "for the flimsiest of reasons"—that is, an open warrant in Iowa—and was improperly kept from her custody by BMCW's failure to move John G. to Iowa. Elizabeth M. argues that now that John G. is two and one-half years old, and even though he has never been in her custody and she has only visited with him twice, she has "righted the ship" and is ready to assume parental responsibility for him. She states that John G. "would not be harmed in any way if he were reunited with" her.

¶13 The State and the GAL point out that an open warrant and extradition request to Iowa is not a "flimsy reason" for initially removing John G. from Elizabeth M.'s custody. Moreover, BMCW's inability to transfer custody of John G. to Iowa was not the result of its lack of due diligence but rather was caused by Elizabeth M.'s own choices that made her unavailable, her aunt's lack of cooperation, and her sister's criminal and child-protective-services history. The State and GAL also note that Elizabeth M.'s assertion that John G. would not be harmed by being taken away from the only family he has ever known and being placed with Elizabeth M., with whom he has never lived and has only met twice, reflects a lack of understanding of John G.'s needs and best interests. They argue that the trial court properly considered all of the statutory factors for determining John G.'s best interests and properly concluded on the undisputed facts that John G.'s best interests were served by terminating Elizabeth M.'s parental rights and adoption. We agree.

¶14 During the dispositional stage, when determining whether termination is in the child's best interests, the trial court is to consider the following factors:

> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
>
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.

> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

WIS. STAT. § 48.426(3).

¶15 Here, the parties agree that these are the factors the trial court is to apply when considering the child's best interests. The sole issue on appeal is whether the trial court properly considered those factors when concluding that termination was in John G.'s best interests. We consider each of the statutory factors in turn.

1. The Likelihood of the Child's Adoption After Termination.

¶16 Elizabeth M. concedes that John G. is likely to be adopted upon termination of her parental rights and that this factor is well supported by the record. John G. has lived with the same foster mother since his birth, and his foster mother testified at the dispositional hearing that she wants to adopt him and has completed the adoption licensing process. This factor weighs in favor of termination.

2. The Age and Health of the Child, Both at the Time of the Disposition and, if Applicable, at the Time the Child was Removed from the Home.

¶17 There is no dispute that John G. was removed from Elizabeth M.'s custody immediately after his birth and was never returned to her. At the time of the dispositional hearing, John G. was two and one-half years old. During his entire life, John G. has lived with his foster mother, was well cared for by her, and is healthy and well-adjusted in her custody. There is no dispute that John G. has had no significant health problems and has reached or exceeded all developmental milestones. We conclude that the trial court properly found that John G.'s "age

and health now and at the time of his removal are all fully supportive of the proposition that adoption is what should happen for him." Thus, this factor, too, weighs in favor of termination.

3. Whether the Child has Substantial Relationships with the Parent or other Family Members, and Whether it Would Be Harmful to the Child to Sever These Relationships.

¶18 Elizabeth M. does not dispute the fact that neither she nor any of her family members has had any relationship of any kind with John G. Yet she generally argues, without citation to any authority, much less to the record, that a strong psychological bond exists between mothers and their separated children. Thus, she infers from this unsupported principle, that John G. would be harmed if her relationship with him was severed.

¶19 The record completely refutes this unsupported argument. A BMCW case worker testified that she did not believe, as of the date of the dispositional hearing, that there was any sort of relationship between Elizabeth M. and John G. Even Elizabeth M., in her testimony at the dispositional hearing, never claimed any bond or relationship with John G. In fact, the evidence showed the absence of a bond. The case worker testified that the two times Elizabeth M. visited John G. he "was very skittish towards her because essentially she was a stranger to him." Eventually, the case worker had to call John G.'s foster mother into the room because John G. continued to ask for her. In short, there is nothing in the record that supports Elizabeth M.'s argument that John G. had any bond with her that would be harmed by termination.

¶20 Instead, Elizabeth M. turns the statutory analysis on its head and argues that John G. would not be harmed if his relationship *with his foster mother* was severed. Elizabeth M. argues, again, without any support from the record,

case law or literature that John G. is so young that he has not developed the sort of strong bonds with his foster mother such that he would be harmed if he were to be removed from his foster mother's care and placed with Elizabeth M.

¶21 Contrary to Elizabeth M.'s argument, the record demonstrates that John G. has bonded with his foster mother, consistent with the case worker's observations at the supervised visit. He calls her "mommy" and finds comfort being around her. John G. has developed relationships with the foster mother's family. She has become his psychological parent: "a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support." *See* LINDA ELROD, CHILD CUSTODY PRACTICE & PROCEDURE § 1:2. Severing that bond is likely to cause the child to experience psychological, emotional, and social problems through adulthood. Bruce D. Perry, *Bonding and Attachment in Maltreated Children: Consequences of Emotional Neglect in Childhood*, THE CHILDTRAUMA ACADEMY, http://childtrauma.org/images/stories/Articles/attcar4_03_v2_r.pdf (last visited April 24, 2012).

¶22 Elizabeth M. blames everyone but herself for her failure to bond with John G. She does not acknowledge her role in the open warrant and extradition to Iowa, her incarceration or her extended probation. She blames BMCW for not transferring John G.'s custody to Iowa, yet admits in her testimony that she could have pursued having her probation transferred to Wisconsin but did not do so. She also does not acknowledge the role of her aunt's lack of cooperation and her sister's criminal and child-protective-services history in BMCW's attempts to transfer John G.'s foster placement to Iowa.

¶23 Most tellingly, Elizabeth M. has no excuse for failing to contact John G. while he was in foster care. Even if John G. was too young to talk on the phone, Elizabeth M. could have called his foster mother to check up on his well-being or sent the foster mother photos and gifts for John G. Elizabeth M. could have visited John G., even without a driver's license, receiving rides from friends or family or taking the bus. She did none of these things. Her lack of any bond with John G. is due to her own choices.

¶24 The trial court reasonably found that all of Elizabeth M.'s attempts at blame-shifting failed: "It's the choices that she made, it's the decisions that she made that ultimately put this distance between herself and John." On the issue of John G.'s bonding with his foster mother, the trial court said: "This is his family. It's always been his family. It's the only family he knows. Every important relationship that he has in his life is within that family constellation, and he has literally no relationship with his mother [Elizabeth M.] or with his extended family."

¶25 The trial court found that "any removal of John [G.] [from his foster home] and trying to integrate him into his family of origin entails disrupting the relationships that have existed for two and a half years." The trial court noted that the law presumes that if a parent creates a safety issue for his or her child that causes the child to be removed from his or her custody and then fails to remedy the issue for fifteen months, termination of parental rights should be pursued. *See*

WIS. STAT. § 48.417(1)(a), *amended by* 2009 Wis. Act 79, § 78 (eff. Jan 1, 2010).[3] As the trial court noted, the reason behind the fifteen-month timeframe is to ensure that "when children are in substitute care giver's homes, they develop relationships that are critical to them ultimately in their healthy emotional development."

¶26 That reasoning applies here. In thirty months, twice the time allowed by law, Elizabeth M. made no attempt to get custody of John G. and even acknowledged at trial that she could have tried to get her probation transferred to Milwaukee, but chose not to. This factor also weighs in favor of termination.

4. The Wishes of the Child.

¶27 John G. is too young to express his wishes in words, but his actions at the supervised visit as noted above, clearly convey that he has bonded with his foster mother and not at all with Elizabeth M. The trial court noted that John G.'s "wishes are somewhat indiscernible, other than the inferences that you draw from the nature of the relationship between he and his foster mother." We agree. This factor, too, weighs in favor of terminating Elizabeth M.'s parental rights.

[3] WISCONSIN STAT. § 48.417(1) states, in relevant part:

> [A]n agency or the district attorney, corporation counsel or other appropriate official … shall file a petition under s. 48.42(1) to terminate the parental rights of a parent or the parents of a child … if any of the following circumstances apply:
>
> (a) The child has been placed outside of his or her home … in a foster home … for 15 of the most recent 22 months ….

5. The Duration of Separation of the Parent from the Child.

¶28 John G. has not lived with Elizabeth M. since he was six days old. His entire life, two and one-half years, he has only lived with his foster mother. Thus, this factor supports termination.

6. Whether the Child Will Be Able to Enter into a More Stable and Permanent Family Relationship as a Result of the Termination, Taking into Account the Conditions of the Child's Current Placement, the Likelihood of Future Placements and the Results of Prior Placements.

¶29 There is no question that John G. will be able to enter into a more stable and permanent family relationship as a result of termination because his foster mother can then adopt him. She has already cared for him his whole life, providing for him emotionally, physically, mentally and financially. He has bonded with her. She applied to adopt him. This factor, like the others, weighs in favor of termination.

CONCLUSION

¶30 Basically, Elizabeth M. argues for a second chance. She testified that she now wants to raise John G., even though she: (1) is still on probation; (2) is living with her boyfriend and five children; (3) has an unstable financial situation; and (4) has shown little interest in bonding with John G. In short, her interest in caring for John G. comes too little too late.

¶31 All of the statutory factors clearly support the trial court's decision to terminate Elizabeth M.'s parental rights. As the State and GAL correctly point out, the TPR best-interests analysis focuses on John G.'s best interests, not Elizabeth M.'s. A child needs a permanent, loving placement to thrive. John G.

has that with his foster mother. The record shows that John G.'s best interests clearly lie with termination.

¶32 We conclude that the trial court made a reasoned decision based on undisputed facts in the record and properly concluded that it was in John G.'s best interests that Elizabeth M.'s parental rights be terminated.

By the Court.—Order Affirmed.

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