COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.**

No. 01-0147

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

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PATRICIA S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Patricia S. appeals an order terminating her parental rights to her son, Brandon S.[2] She raises two issues that have been preserved for appellate review. Patricia contends that the legal standards and procedures safeguarding her rights were not met. She further claims that the trial court failed to consider all of the statutory best interest factors in WIS. STAT. § 48.426(3) and termination is not warranted under those factors. The record does not support Patricia's arguments, and this court therefore affirms the trial court's order.

BACKGROUND

¶2 The parties have provided this court with the case's context by comprehensively recounting the factual and procedural background. This court, however, will only recite those facts necessary to determine the issues presented.

DISCUSSION

1. No Contest Plea

¶3 Patricia first argues that the legal standards and procedures safeguarding her rights were not met. Specifically, she claims that "the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 1999-2000 version.

[2] Brandon's biological father did not contest the termination of his parental rights.

prerequisites for consent to termination were not met,"[3] and that the court did not adequately ascertain her understanding of the proceeding where she pled no contest to the termination grounds in the petition. This court is satisfied that Patricia's claims are without merit.

¶4 In asserting that the court failed to employ the proper legal standards in accepting her no contest plea, Patricia relies primarily upon ***In re D.L.S.***, 112 Wis. 2d 180, 332 N.W.2d 293 (1983), and ***In re A.B.***, 151 Wis. 2d 312, 444 N.W.2d 415 (Ct. App. 1989). However, these cases, and the standards they enunciate, pertain to voluntary termination of parental rights, not to accepting a no contest plea concerning the grounds for termination. Here, as the County correctly observes, Patricia did not voluntarily consent to termination of her parental rights. Rather, she pled no contest to the termination grounds alleged in the petition, choosing instead to contest termination of her parental rights.

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[3] Patricia raises several other issues that were not preserved for appeal and will therefore not be addressed. She argues that because the CHIPS record and order were not made a part of the TPR proceeding's record, a number of matters cannot be ascertained, such as whether she received the warnings and grounds for termination pursuant to WIS. STAT. § 48.356. *See* appellant's brief § I. B. Further, Patricia speculates that the trial court lost "jurisdiction." As a basis for this suggestion Patricia does not demonstrate, but rather hypothesizes, the possibility that the trial court failed to comply with mandatory time limits. *See* appellant's brief § I. C. Finally, Patricia argues that she was cognitively incapable of complying with the court's reunification requirements and that because of her disabilities, under state and federal law the Department of Social Services was required to do more to effect reunification. *See* appellant's brief § III.

An appellant has the burden to establish "by reference to the record, that [an] issue was raised before the circuit court." ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). Patricia has not implied that the matters discussed in sections I. B., C. and III. of her brief were raised in the trial court, let alone provided a reference to the record establishing that they were. Indeed, this court's independent review of the record demonstrates that these issues were raised for the first time on appeal. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974).

¶5 Upon a careful review of the record, this court concludes that there was an ample basis for the trial court to find that Patricia knowingly and voluntarily agreed not to contest the grounds for termination that were alleged in the petition. In her presence, Patricia's trial attorney initially advised the court that he had recently discussed the case "in great detail" with Patricia, her sister and her father.

> We talked about Patricia['s] rights in this case, we talked about her right to have a jury trial, what would happen at a trial, her right to call witnesses, we talked about the pros and cons of going to trial and what her options were, and my client advised me that she wanted to waive her right to have a jury trial, … that she would proceed with contesting the actual termination of her parental rights and fight this battle at the final disposition hearing phase ….

The trial court then conducted a comprehensive and comprehensible colloquy.[4] The County's counsel also asked Patricia questions to establish her understanding of the purpose and effects of the proceeding. Patricia gave appropriate responses to every question, demonstrating her comprehension. At no time did she indicate or intimate difficulty understanding what was transpiring,[5] and when specifically asked if there was any reason she would not be able to understand the proceedings, she answered, "I know what's going on." Finally, at the end of the court's colloquy, Patricia indicated that she understood everything that had been said.

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[4] To summarize, the trial court advised Patricia of all of the applicable rights and the effect of a no contest plea on those rights. It also inquired into Patricia's opportunity to consult with her attorney, discussed the County's burden of proof, described in detail the alleged termination grounds and through a social worker's testimony, and independently confirmed a factual basis for the allegations. *See* WIS. STAT. § 48.422(7). Finally, the trial court clearly advised Patricia that her plea would constitute an admission that the allegations were true.

[5] Patricia implies in her brief that she was taking medication at the time she pled no contest to the petition, but at the hearing she denied that her medication interfered with her ability to understand the proceedings.

¶6 The record confirms that the court took care to ascertain Patricia's understanding of the plea proceeding and the consequences of pleading no contest to the termination grounds in the petition.

2. Best Interests

¶7 Patricia next argues that terminating her parental rights was not in Brandon's best interests. She contends that termination is not warranted under the best interests factors in WIS. STAT. § 48.426(3)[6] and that the trial court "did not weigh the positive and negative factors concerning termination." This court is unpersuaded.

¶8 Under the "best interests" heading, Patricia first notes that Brandon's foster parents at the time of the termination hearing did not intend to adopt

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[6] WISCONSIN STAT. § 48.426 provides:

> (1) COURT CONSIDERATIONS. In making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425.
> (2) STANDARD. The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.
> (3) FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
> (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.

Brandon. Patricia argues that "there was not evidence given that he was likely to be adopted except a statement to that effect by social services. There has been so much trouble in the history of this child we can not be *sure* that there will be an adoptive family found." (Emphasis added.)

¶9 Linda Doro, Brandon and Patricia's social worker, testified that the foster parents had made a commitment to care for Brandon until an adoptive placement was found. Doro further stated that based upon her experience in termination cases involving children in similar situations, it is likely that Brandon will be adopted. Consistent with this testimony, the trial court found that Brandon would likely be adopted.

¶10 Findings of fact will not be upset on appeal unless clearly erroneous. WIS. STAT. § 805.17(2). The trial court is the arbiter of the witnesses' credibility, and its findings will not be overturned on appeal unless they are patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶11 As Patricia concedes, there is evidence in the record to support the trial court's finding. Her nonspecific reference to "the history of this child" and her conclusion therefrom that Brandon's future adoption is not certain, do not demonstrate that the trial court's finding was clearly erroneous. Moreover, Patricia employs an improper standard. The statute requires the trial court to make a finding regarding the likelihood, not the certainty, of future adoption. Therefore, Patricia's argument is without merit.

¶12 Patricia next argues that WIS. STAT. § 48.426(3) requires the trial court to consider, among other factors, the child's wishes and the relationship

between parent and child. She then recites evidence describing the nature of Patricia and Brandon's interaction and relationship. Without benefit of record cites, Patricia also states that "Brandon indicated that he loved to be with his mom every day because he likes her." She then effectively concludes this portion of the best interests argument by asserting that there is no purpose for ending this relationship "except perhaps to meet federal requirements for certain state and county reimbursements for other social programs, and to hope the child is adopted so that the county will no longer have a foster care payment obligation."

¶13 After a finding that grounds for a termination of parental rights exist, a trial court's decision to terminate parental rights is an exercise of discretion. *See* ***K.D.J. v. Polk County Dept. of Soc. Servs.***, 163 Wis. 2d 90, 104, 470 N.W.2d 914 (1991). Whether the trial court properly exercised discretion presents a question of law. ***Seep v. State Personnel Comm'n***, 140 Wis. 2d 32, 38, 409 N.W.2d 142 (Ct. App. 1987). This court will uphold the court's discretionary decision if the record demonstrates that the court has examined the relevant facts, applied a proper standard of law and employed a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See* ***In re B.W.S.***, 131 Wis. 2d 301, 315, 388 N.W.2d 615 (1986). Further, this court looks to the record for reasons to sustain a trial court's discretionary decision. *See* ***In re R.P.R.***, 98 Wis. 2d 613, 619, 297 N.W.2d 833 (1980). Underlying discretionary decisions may be issues of fact, to which is applied the "clearly erroneous" standard of review. WIS. STAT. § 805.17(2).

¶14 First, this court stresses that, Patricia's insinuation notwithstanding, there is absolutely no basis in the record to suggest that the trial court's termination decision was improperly motivated. More to an appropriate point, and contrary to Patricia's contentions, the record is replete with substantial evidence

that termination was in Brandon's best interests. Further, the record demonstrates that the trial court carefully reviewed the factors in WIS. STAT. § 48.426(3) based upon the evidence that it evidently found credible.

¶15 Again, the court found that despite Brandon's challenging behavior, he has special characteristics "that make him highly likely to be adopted …." The trial court specifically considered Brandon's age (seven years old), and the period of time he had been in foster placement. Based on the expert opinions the trial court credited, it found that while Brandon had a relationship with Patricia, it was not so substantial that Brandon would be harmed if it was severed. As to Brandon's wishes, his guardian ad litem advised the court that Brandon could not express them because of his age and cognitive disabilities, although he was "not terribly bonded to his mother" except when he is with her. While not referring to Brandon's wishes specifically, the trial court nevertheless determined that Brandon did not have as strong a bond to Patricia as she had to him. The court further found, based on the evidence, that Patricia's disabilities hamper her parenting ability to the extent that Brandon's "ability to be everything [he] can be" would be destroyed. The trial court determined that terminating Patricia's parental rights would afford Brandon access to a more stable, permanent, safe, caring and nurturing parental relationship, thereby permitting him "to blossom and become the very finest human being he can be."

¶16 In light of the evidence and its consideration of the factors under WIS. STAT. § 48.426(3), the court found that terminating Patricia's parental rights was in Brandon's best interests. Patricia does not successfully demonstrate that the court's findings were clearly erroneous, or that it failed to examine the relevant facts, apply a proper standard of law or employ an unreasonable rationale. Rather, she points to evidence that could have supported findings that the trial court could

have, but did not make. Such an approach cannot succeed under the applicable standards of review. The trial court's order terminating Patricia's parental rights to Brandon is therefore affirmed.

By the Court.—Order affirmed.

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