COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2004

Cornelia G. Clark
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 Nos. 04-0163
04-0164

Cir. Ct. Nos. 02TP000014
02TP000016

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO HERTEL F., II, A PERSON UNDER THE AGE OF 18: **NO. 04-0163**

RACINE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

KAMILLA F.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO ASHLEY L., A PERSON UNDER THE AGE OF 18: **NO. 04-0164**

RACINE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

KAMILLA F.,

RESPONDENT-APPELLANT.

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

¶1 SNYDER, J.[1] Kamilla F. appeals from orders terminating her parental rights to her children, Hertel F., II (D.O.B. July 17, 1997) and Ashley L. (D.O.B. November 22, 2000). Kamilla contends that at the dispositional phase of the termination of parental rights proceeding (TPR), the trial court failed to consider two statutory factors: (1) whether a substantial relationship with each child existed that would be harmed by the termination of Kamilla's parental rights and (2) the wishes of each child as to Kamilla's parental termination. We affirm the orders terminating Kamilla's parental rights.

BACKGROUND

¶2 The Racine County Department of Human Services filed the petitions for the termination of Kamilla's parental rights on March 13, 2002.[2] On May 23, 2002, in response to the first phase of the termination proceedings, Kamilla stipulated that grounds existed to terminate her parental rights. *See* WIS. STAT. §§ 48.415(1), 48.415(2) and 48.415(6). Kamilla also stipulated to and received a one-year delay of the dispositions, the second phase of the termination proceedings, which stipulation provided for a dismissal of the petitions if she met

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version of the Wisconsin Statutes unless otherwise stated.

[2] The County also filed for the termination of the rights of the children's father. His rights have been terminated and the termination order has not been appealed.

parental conditions for the return of the children to her care and custody. *See* WIS. STAT. § 48.315(1)(b).

¶3 On February 26, 2003, the County moved to reinstate the termination proceedings and to hold a second-phase dispositional hearing. In September 2003, the court then held a bifurcated WIS. STAT. § 48.427 dispositional hearing to determine whether the termination of Kamilla's parental rights would be in the best interests of Hertel and Ashley.

¶4 Denise Jones, a certified social worker and the manager for the Child Protective Services Unit, Racine County Human Services Department, provided the evidentiary background concerning Kamilla's relationship with Hertel and Ashley. Jones testified that Hertel had been designated a child in need of protection and services (CHIPS), *see* WIS. STAT. § 48.13, on March 6, 2000, and was six years old during the dispositional hearings in September 2003. Hertel had lived apart from Kamilla in a CHIPS out-of-home placement since January 10, 2000, and was placed in foster care with Ashley after she was born on November 22, 2000. Ashley, age two in September 2003, never lived with Kamilla. Jones stated that Hertel knows who his mother is[3] and that Kamilla did have both supervised and unsupervised placement with Hertel during his CHIPS placements.

¶5 Jones further testified that Hertel had established a relationship in his CHIPS placement apart from Kamilla.[4] Jones described Hertel's placement away

[3] Jones stated that "[Hertel] knows his mother, but I think that the permanency of a relationship with an adoptive resource outweighs that [fact]."

[4] Jones related that "[Hertel] has a very close relationship with his foster mother. He sees her more as his mother-grandmother role. They're very close to each other. I see the nurturing and the bonding when I'm there."

from Kamilla as "a significant amount of separation for a child and parent" and that there was no regular bonding between the two due to the three years of separation. Jones testified that Ashley "has more of a substantial relationship with her foster mother than she has with [Kamilla] because of her age.… She is just learning who [Kamilla] is." Further, Jones explained that Ashley has not had any duration of time where she has lived with Kamilla.

¶6 Jones testified as to Kamilla's failure to provide for the physical and emotional needs of Hertel and Ashley, her continued alcohol and drug use in spite of receiving counseling, therapy and services, her inability to meet nutritional and supervision needs of the children, and her failure to fully cooperate in parent services programs and to visit the children when scheduled. As to Kamilla's ability to control her alcohol and drug use, Jones testified that Kamilla "had a dirty urinalysis in February of 2003." Kamilla conceded the drug relapse and that her failure to remain free from drugs and alcohol was a violation of the dispositional hold-open conditions.

¶7 In summarizing her testimony of Kamilla's parental relationship with Hertel and Ashley, Jones related the following as reservations:

> [Kamilla's] inability to follow the Court's orders. Her inability to stay drug and alcohol free. Her inability to provide for the emotional and physical needs of her children. Her ability to be able to hold employment on a permanent full-time basis. Her ability to be able to make an apartment that has the necessary food, clothing, and supervision for her children.

¶8 The guardian ad litem (GAL) advised the court that "based on the evidence presented in court it's my opinion that it is in the children's best interest to have Kamilla[]'s parental rights terminated in order to provide future

permanency for the children that is needed." In support of the recommendation, the GAL stated further:

> I believe the evidence has clearly shown that [Kamilla] has been unable to provide appropriate housing for the children…. She hasn't been able to secure employment for herself to provide a stable home and some of those things that were already mentioned. She has not continued sobriety from drugs and alcohol for a length of time that could provide stability for the children to be with her. She has not proven an ability to be able to care for the children due to the lack of all of those things that I've mentioned. I believe her desire to provide a home for them in this courtroom is genuine, but I just think that she hasn't demonstrated throughout the length of this case an ability to continue to be a stable force for those children and I don't think she will be able to do it in the future based upon her past.

¶9 The trial court made findings based upon the evidence and the GAL's recommendation as to whether it would be harmful to Hertel and/or Ashley to sever their parental relationship to Kamilla:

> The Court finds that there is no substantial relationship with either parent. The Court finds that there are no substantial relationships with members of the parents' families, maternal or paternal.
>
> The Court finds that it would not be harmful to sever the child's relationship with the children's parents or members of the parent's families.

DISCUSSION

¶10 Kamilla contends that the trial court failed to sufficiently consider two of the six WIS. STAT. § 48.426(3) factors in terminating her parental rights to Hertel and to Ashley. The two statutory factors are as follows:

> **(3)** FACTORS. In considering the best interests of the child under this section the court shall consider but not be limited to the following:
>
> ….
>
> (c) Whether the child has substantial relationships with the parent … and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.

Sec. 48.426(3).

¶11 Whether there is sufficient evidence at the disposition phase to warrant the termination of parental rights is a matter vested to the trial court's discretion. ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶4, 255 Wis. 2d 170, 648 N.W.2d 402. "The statutes governing petitions for termination of parental rights require the court, in the exercise of its discretion, to consider the best interests of the child as the prevailing factor in a disposition under WIS. STAT. § 48.427." ***Julie A.B.***, 255 Wis. 2d 170, ¶4. In deciding whether to terminate a parent's rights, the trial court may consider any relevant evidence as well as alternative dispositional recommendations. ***Id.***, ¶29. The trial court "*shall* consider any report submitted by an agency under § 48.425, and it *shall* consider the six factors set out in § 48.426(3)," in determining the best interests of the children. ***Julie A.B.***, 255 Wis. 2d 170, ¶29.

¶12 Kamilla takes exception to the above court findings. She cites to ***State v. Margaret H.***, 2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475, in support

of her position that the evidence does not support the conclusion that no substantial relationship would be harmed by the severance of her rights. ***Margaret H.*** relates in part:

> [T]he substantial relationships referenced in WIS. STAT. § 48.426(3)(c) include the child's emotional and psychological connections to the child's birth family. These emotional and psychological connections might be severed upon the termination of parental rights.

Margaret H., 234 Wis. 2d 606, ¶19. Kamilla contends that the ***Margaret H.*** language mandates psychological evaluations and evidence, especially as to Hertel, "who had been in his mother's exclusive care for the first half of his life," before the court can conclude that substantial relationships between parent and children would not be harmed.

¶13 The trial court must hear testimony relevant to the issue of a TPR disposition, including expert testimony. *See* WIS. STAT. § 48.427(1). The record, however, relates that Kamilla made a request for psychological evaluations of Hertel and/or Ashley and then withdrew it on the record before the court on June 20, 2003, when Kamilla's trial counsel indicated that a psychological examination would not be used and that the matter was ready to go to disposition.

¶14 In spite of the withdrawal of Kamilla's request for expert psychological evaluations prior to the dispositional hearings, Kamilla's trial counsel, Attorney Sean Brown, stated as follows during the hearings in September 2003:

> I believe I had previously requested that the Court allow a psychological examination of the children and the court had denied that. It's clear that one of the factors here is the harm that the—the nature of the relationship the children have with the parents and what harm there would be to sever that. I guess I would renew at this time my request to

> the Court to allow me to retain an expert to examine the children in that regard.

¶15 Notwithstanding Brown's characterization, the trial court did not deny the original request for a psychological examination of the older child, Hertel. The court had, in fact, ordered a two-step process for such an examination, stating:

> First step is to have a record review by your psychologist and a determination from that record review by the psychologist as to whether or not there would be a meaningful [oral] interview process.… If then the psychologist gives substantial reasons for the belief that an oral interview of the child would produce substantial and significant information bearing on the issue at hand, the Court would then consider going forward with permitting the development of evidence along those lines.

¶16 Brown did not produce the psychologist report and indicated he no longer wished to pursue the psychological exam.[5] On the record, the court confirmed that the request for a psychological exam was withdrawn.

¶17 The trial court denied Kamilla's newly revived request because it was an eleventh-hour request and would unnecessarily and unduly delay the ultimate disposition of the case and be detrimental to the interests of the children, who have a right to a timely resolution. The court cited to the statutory directive that TPR proceedings be given priority. We are satisfied that Kamilla's request for psychological examinations during the trial amount to a change of trial strategy. A deliberate choice of strategy is binding on a defendant and an appellate claim of error based upon that choice will not be reviewed even if the

[5] At the review hearing on June 20, 2003, Attorney Carolyn Delery substituted for Attorney Sean Brown. On the record, Delery stated that Brown had written to her that he was "not going to use a psych examination…. He does not have to interview the children."

chosen strategy backfires. ***State v. Hyndman***, 170 Wis. 2d 198, 209, 488 N.W2d 111 (Ct. App. 1992) (*citing* ***State v. McDonald***, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971).

¶18 Further, we are not satisfied that ***Margaret H.*** mandates that psychological evidence is necessary to address the issue of emotional and psychological harm in each termination case in the absence of a request from an interested party, including the GAL. In ***Margaret H.***, the supreme court stated that:

> We thus interpret WIS. STAT. § 48.426(3)(c) to unambiguously require that a circuit court evaluate the effect of a legal severance on the broader relationships existing between a child and the child's birth family. These relationships *encompass* emotional and psychological bonds fostered between the child and the family.

Margaret H., 234 Wis. 2d 606, ¶21. (Emphasis added.)

¶19 While emotional and psychological bonds may be encompassed by, and a part of, the broader severed parental relationships, we do not read ***Margaret H.*** as mandating expert testimony or psychological evidence in every contested TPR case. In spite of the fact that Kamilla had earlier abandoned her right to obtain such evidence, the trial court balanced the merit of her renewed request to the delay in obtaining such evidence. The trial stated that the premise for an eleventh hour psychological examination was weak at best and that:

> [W]e know as a matter of fact and it's undisputed that from two days after the birth of Ashley to the current date that child has never been with [Kamilla]. And we know as a matter of fact that for a period of time in excess of three years Hertel has not been with his mother. Though he knows her and knows who she is, he has not been with her in a living day-to-day type situation. And it's questionable given those undisputed facts that an expert would even be

> able to offer evidence in this case that would be relevant and material to the ultimate decision of the Court.

¶20 We are satisfied that the trial court properly considered the WIS. STAT. § 48.426(3)(c) factor, applied the factor to the law and to the facts, and did so while properly taking into account the best interests of Hertel and Ashley and the parental rights of Kamilla.

¶21 We now turn to Kamilla's contention that Hertel and Ashley's wishes were not considered, as required by WIS. STAT. § 48.426(3)(d). Kamilla contends that while the children need not communicate their wishes personally at the dispositional hearing, *see* ***Jerry M. v. Dennis L.M.***, 198 Wis. 2d 10, 22 n.5, 542 N.W.2d 162 (Ct. App. 1995), others may testify to the children's wishes as communicated to them, *see* ***id.***, and the GAL has a "duty to inform the court of the children's wishes and to make recommendations to the court even if those recommendations are against the wishes of the children." *See* ***id***. at 22. Specifically, Kamilla complains that the GAL never articulated the wishes of Hertel and Ashley to the court.

¶22 The facts in ***Jerry M.*** are significantly different. The wishes of the ***Jerry M.*** children, Emil (D.O.B. 6/10/83) and Guenther (D.O.B. 3/23/87), as to the termination of their father's parental rights and adoption by their grandfather, were presented to the court in the GAL's report.[6] ***Id***. at 23. The GAL recommended termination of the father's parental rights but disagreed with the children's wishes that they maintain some contact with their father. ***Id***. The ***Jerry M.*** children were

[6] The children's father had been convicted, inter alia**,** of the first-degree intentional homicide of their mother and false imprisonment of the children. ***Jerry M. v. Dennis L.M.***, 198 Wis. 2d 10, 14-15, 542 N.W.2d 162 (Ct. App. 1995).

eight and twelve years of age when the appellate decision was issued on November 1, 1995.

¶22 Here, the undisputed evidence is that Hertel was six years and two months old at the time of the dispositional hearing in September 2003 and had not lived with Kamilla since January 10, 2000. Ashley was two years and ten months old at that time and had never lived with Kamilla since her birth on November 22, 2000. On May 23, 2002, Kamilla stipulated that she had abandoned and failed to provide care for the children during the respective periods of separation.

¶23 Jones testified that she did not ask about the children's wishes about termination of Kamilla's parental rights "[b]ecause of their age." Addressing the record testimony and evidence, the trial court found as follows:

> Two year old simply does not have the capacity to even approach understanding in these [TPR] matters. Six year old is again of an age that although there is no bright line rule relative to a child's ability to testify, certainly a six year old would have to be at the far far end of the ages when such child's testimony would be of value….

¶24 As Kamilla points out in her brief, WIS. STAT. § 48.426(3)(d) does not designate a specific age when a child's wishes as to parental termination are or are not required. We are satisfied that the trial court considered the subsec. (3)(d) factor as properly related to the evidence of separation of the children from Kamilla, their respective ages and consistent with the mandated focus upon the best interests of the children. Whether the wishes of the children are necessary and probative of the best interests of the children must be considered, but that consideration is within the discretion of the trial court as to the ultimate TPR disposition. We conclude that the trial court properly exercised its discretion in

regard to consideration of the children's wish factor and that its findings were not erroneous.

By the Court.—Orders affirmed.

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