COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2011

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 Nos. 2011AP533
2011AP534
2011AP535
2011AP536

Cir. Ct. Nos. 2009TP114
2009TP115
2009TP116
2010TP218

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO K'WAN M., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BEVERLY H.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO DE'JANA N., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BEVERLY H.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO DA'JANIQUE N., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BEVERLY H.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO DE'SHAY N., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BEVERLY H.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge.[1] *Affirmed.*

¶1 CURLEY, P.J.[2] Beverly H. appeals the order terminating her parental rights to her children K'wan, De'Jana,[3] Da'Janique, and De'Shay. She contends that the trial court erred in relying on WIS. STAT. § 42.424(4) when it refused her request for an adjournment of the dispositional hearing following a jury verdict finding grounds to terminate her parental rights[4] because under WIS. STAT. § 48.31(7)(a), she should have been given a "reasonable time to prepare" for the dispositional hearing. Beverly H. submits the best way to resolve the conflict between the two statutes is for this court to remand the matter and grant her a new dispositional hearing. She also claims that the failure of the trial court to grant her an adjournment resulted in a violation of her due process rights.

¶2 This Court disagrees with Beverly H.'s arguments on appeal. Whether this court applies the legal doctrine holding that when there are

[1] These cases were originally assigned to the Honorable Christopher R. Foley. They were later reassigned to the Honorable Marshall B. Murray, who presided over trial and issued the orders that Beverly H. now appeals.

[2] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(3) (2009-10).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] This court notes that the name of Beverly H.'s daughter De'Jana, born July 2, 2004, has numerous spelling variations used throughout the record, including, but not limited to, "De'Jana'e." For consistency's sake, this court will use the spelling provided by the parties' briefs—"De'Jana."

[4] Termination of parental rights cases are known by the acronym TPR.

conflicting statutes a specific statute trumps a general statute, or whether it applies the legal doctrine holding that this court is obligated to harmonize conflicting statutes, the conclusion is the same: the trial court did not err in relying on WIS. STAT. § 42.424(4) to immediately proceed to the dispositional hearing following trial. Section 48.424(4) is the specific statute addressing fact finding hearings in TPR cases, and WIS. STAT. § 48.31(7)(a) is the general statute; therefore, § 48.424(4) controls. Furthermore, when the two statutes are harmonized, § 48.424(4) is the operative statute to be utilized after a fact finder finds grounds have been proved for the TPR. Finally, this court also concludes that Beverly H.'s due process rights were not violated by the denial of an adjournment. Consequently, this court affirms.

I. BACKGROUND.

¶3 Beverly H.'s children named in this petition to terminate her parental rights include: K'Wan, born 6/24/01; De'Jana, born 7/02/04; Da'Janique, born 8/15/05; and De'Shay, born 9/16/09.[5] The three older children in this case were found to be in need of protection or services (CHIPS)[6] on November 15, 2007, by a circuit court judge due to domestic violence issues in Beverly H.'s home that created an unsafe environment for the children. Beverly H. failed to meet the conditions for the return of the children, and the children have not lived with her since that date. On March 9, 2010, a circuit court judge also found De'Shay—

[5] Beverly H. has several other children. Her parental rights to three of those children were terminated in Kenosha County in 2000.

[6] CHIPS is an acronym for child in need of protection or services.

who had been detained at birth and placed in out-of-home care due to the fact that Beverly H. was homeless at the time of his birth, had no resources, and other safety concerns—to be a child in need of protection or services. Beverly H. was unable to comply with the requirements to have custody of De'Shay, and De'Shay has never lived with her.

¶4 The petitions to terminate Beverly H.'s parental rights to the three older children were filed on April 30, 2009. The petitions alleged that the children were in continuing need of protection or services and that Beverly H. failed to meet any of the conditions for their return to her. The petition further stated that Beverly H. was substantially unlikely to meet the conditions of return in the next nine months.

¶5 The petition to terminate Beverly H.'s parental rights to De'Shay was filed on July 26, 2010. It alleged that Beverly H. had failed to assume parental responsibility for him, as that term is defined by WIS. STAT. § 48.415(6), and that she was unfit.

¶6 On August 23, 2010, the trial court granted the State's motion to join all the cases for trial. After the cases were consolidated, numerous adjournments occurred for a variety of reasons. As relevant to an issue presented in this case, the judgment roll reflects that on November 8, 2010, the trial court informed the parties that should grounds be established at the jury trial scheduled for that day, the case would proceed to the dispositional phase on November 11, 2010, at 1:00 p.m.: Later that same day, the case was transferred to another court. There, the trial court asked Beverly H. whether she wished the new judge to hear the case and, in response, she consented to the judicial transfer. In discussing the

procedure to be utilized, the trial court told Beverly H. that: "I tend to want to try to do the dispositional phase right after [the jury verdict is returned]." Beverly H. told the court that she understood, and further expressed her concern that the case not be delayed again as it had been pending for the past year and a half.

¶7 A jury trial was then held, which lasted several days. With respect to the three older children, the jury found that: (1) the children had been adjudged in need of protection or services and had been placed outside the home for a cumulative period of six months or longer; (2) the Bureau made reasonable efforts to provide the services ordered by the court; (3) Beverly H. had failed to meet the conditions for their return; and (4) there was a substantial likelihood that Beverly H. would not meet the conditions for return in the next nine months. As to De'Shay, the jury found that Beverly H. failed to assume parental responsibility for him.

¶8 After the jury was discharged, the trial court inquired whether any of the parties had any motions. The State asked the trial court to enter judgment on the verdict and to immediately move to the dispositional phase. Beverly H.'s attorney implicitly asked for an adjournment because he requested that a bonding assessment be obtained and he advised the court that witnesses not then present would be called to testify. The guardian ad litem agreed with the State and told the court that she would concede that the children have a relationship with their mother, thereby eliminating the request for the bonding assessment. The trial court agreed with the State's motion, granted judgment on the verdict, and found Beverly H. unfit.

¶9 During the proceeding, the trial court stated: "We are going to go forward with disposition. I'm not going to grant a bonding assessment. I need to make a decision as to the best interests of the children." As to the proposed witnesses, the trial court found that none of them would address the children's best interests, only Beverly H.'s best interests. Beverly H.'s attorney objected. The trial court commented that since WIS. STAT. § 48.424(4) requires the court to go immediately to disposition, the court assumed Beverly H.'s attorney would have already been prepared to proceed to that phase. The trial court also pointed out that under the statute in question, the dispositional hearing can only be delayed when the parties agree or when the court had not yet received a report. Here, the trial court found that the parties did not agree and the trial court had received the necessary report. Consequently, the trial court proceeded to the dispositional phase and found that it was in the best interests of all the children to terminate Beverly H.'s parental rights.[7]

II. ANALYSIS.

¶10 Beverly H. submits that there is a conflict between two statutes in ch. 48 dealing with the timing of dispositional hearings after the grounds for termination of parental rights are found. She argues that WIS. STAT. § 48.31(7)(a), which states that, "[a]t the close of the fact-finding hearing the court … shall set a date for the dispositional hearing which allows a reasonable time for the parties to prepare" conflicts with WIS. STAT. § 48.424(4), which reads, "[i]f grounds for the

[7] All of the fathers of the children were in default and their parental rights were also terminated. None of the fathers are part of this appeal.

termination of parental rights are found by the court or jury, the court shall find the parent unfit.… The court shall then proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 48.427."

¶11 The State and the guardian ad litem respond that the trial court correctly determined that WIS. STAT. § 48.424(4) was the statute to follow because it is the more specific statute, and specific statutes trump general ones.

¶12 When questions of statutory construction arise, our review is *de novo*. *See* ***Wisconsin Dep't of Revenue v. River City Refuse Removal, Inc.***, 2007 WI 27, ¶26, 299 Wis. 2d 561, 729 N.W.2d 396. "When two statutes relate to the same subject matter, the specific statute controls over the general statute." ***Wieting Funeral Home of Chilton, Inc., v. Meridian Mut. Ins. Co.***, 2004 WI App 218, ¶15, 277 Wis. 2d 274, 690 N.W.2d 442. When statutes conflict, we must attempt to reconcile them if possible. *See* ***Bingenheimer v. Wis. Dep't of Health & Soc. Servs.***, 129 Wis. 2d 100, 107, 383 N.W.2d 898 (1986). "When confronted with an apparent conflict between statutes, we construe sections on the same subject matter to harmonize the provisions and to give each full force and effect." *See* ***id.*** "We will not construe statutes so as to work unreasonable results." *See* ***id.*** at 108.

¶13 There does appear to be a conflict between WIS. STAT. §§ 48.31(7)(a) and 48.424(4). Section 48.31(7)(a) provides: "the court … shall set a date for the dispositional hearing which allows a reasonable time for the parties to prepare." Section 48.424(4), on the other hand, instructs that in TPR cases after grounds are found: "[t]he court shall then proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 48.427." In light

of the conflict, this court is obligated to apply rules of statutory construction. *See, e.g.*, ***Bingenheimer***, 129 Wis. 2d at 107.

¶14 As noted, "[o]ne of the well-recognized canons of statutory construction is that, in the event of a conflict between a general and a specific statute, the latter controls." *See* ***Bornemann v. City of New Berlin***, 27 Wis. 2d 102, 111, 133 N.W.2d 328 (1965). In applying this rule, this court examines not only the statutes at issue, but also the surrounding statutes to put the statutes at issue in their proper context. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681, N.W.2d 110 (We interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results."); *see also* ***State v. Warbelton***, 2008 WI App 42, ¶13, 308 Wis. 2d 459, 747 N.W.2d 717 ("We also consider the scope, context and structure of the statute itself.").

¶15 The court turns first to WIS. STAT. § 48.424. Section 48.424 is found in subch. VIII of ch. 48, entitled "Termination of Parental Rights." (Some capitalization omitted.) All of the statutes in this subchapter, from WIS. STAT. § 48.40 through WIS. STAT. § 48.434—including WIS. STAT. § 48.424—address issues involved in the prosecution of TPR cases. Section 48.424 makes specific reference to fact finding in contested termination of parental rights cases. Furthermore, § 48.424(2) references WIS. STAT. § 48.31, and states: "The fact-finding hearing shall be conducted according to the procedure specified in s. 48.31 except as follows." Given that the title of the subchapter under which the statute appears, the substance of the statute at issue, and the surrounding statutes all

directly reference TPR cases, and given that a portion of § 48.424 in fact modifies the procedure under § 48.31—*see* § 48.424(2)—it would appear that § 48.424 is the more specific statute.

¶16 The court next examines WIS. STAT. § 48.31. Section 48.31 appears in subch. V of ch. 48 of the Wisconsin statutes, which is titled, "Procedure." (Some capitalization omitted.) This title is clearly general in nature, and provides little guidance regarding the kinds of hearings governed by this subchapter. The substance of the statute, furthermore, addresses, for the most part, fact finding hearings emanating out of CHIPS proceedings where a petition has been filed claiming that children, including unborn children, are in need of protection or services. Although there are references to TPR cases in WIS. STAT. § 48.31, the statute's dominant theme is with the procedure governing CHIPS cases. Indeed, a review of ch. 48 reflects that, from WIS. STAT. § 48.13 forward through WIS. STAT. § 48.32—including WIS. STAT. § 48.31—almost all of the statutes address the rights, procedures, service, and dispositions of petitions in CHIPS cases. Thus, § 48.31 is not only part of a subchapter that is more general in scope, but also governs proceedings wholly different from TPR hearings.

¶17 Consequently, this court concludes that § 48.31(7) is the general statute discussing TPR cases and § 48.424(4) is the specific statute. Under this test, WIS. STAT. § 48.424(4) controls. *See, e.g.*, ***Wieting Funeral Home of Chilton, Inc.***, 277 Wis. 2d 274, ¶15.

¶18 Another rule of statutory construction can be found in ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2007 WI 98, ¶28, 303 Wis. 2d 258, 735 N.W.2d 93, in which our supreme court held that "[i]f the potential for conflict between the

statutes is present, we will read the statutes to avoid such a conflict if a reasonable construction exists." *See also* ***Gerczak v. Estate of Gerczak***, 2005 WI App 168, ¶10, 285 Wis. 2d 397, 702 N.W.2d 72 ("Conflicts between statutes are disfavored and will be held not to exist if the statutes may be otherwise construed."). We must attempt to harmonize statutes if they are seemingly in conflict, and we must do so "if it is possible, in a way which will give each full force and effect." ***City of Milwaukee v. Kilgore***, 193 Wis. 2d 168, 184, 532 N.W.2d 690 (1995).

¶19 Applying this rule to the statutes in question, a harmonizing of the two statutes provides the same result as the earlier test. WISCONSIN STAT. § 48.424 sets out the requirements and procedure to be used in a fact finding hearing following a determination by a judge or jury that grounds have been proven in a TPR case. On the other hand, WIS. STAT. § 48.31 addresses fact finding in CHIPS cases, and in that statute, it piggybacks some of its rules to be used in TPR cases. Inasmuch as WIS. STAT. § 48.424(2) makes reference to § 48.31 and directs that the procedures listed in § 48.31 will be modified by § 48.424, a reasonable construction can be made. That is, that § 48.424 applies in TPR cases that are contested. Here, the trial court properly determined that the correct procedure was found in WIS. STAT. § 48.424.

¶20 Finally, Beverly H. contends that the failure to grant her adjournment violated her due process rights. Whether a challenged State action violates the Fourteenth Amendment's due process protections presents a legal question which we review independently of the trial court. *See* ***Monroe Cnty. DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831. "Substantive due process has been traditionally afforded to fundamental liberty interests." ***Id.***,

¶19. Wisconsin has recognized a parent's fundamental liberty interest in parenting his or her child. *See* ***T.M.F. v. Children's Serv. Soc'y of Wisconsin***, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983); *but see* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶22–23, 271 Wis. 2d 1, 678 N.W.2d 856 (Wisconsin law has nonetheless recognized that a parent's rights may be terminated upon proof of parental unfitness by clear and convincing evidence via fundamentally fair procedures.).

¶21 Beverly H.'s complaint is more akin to a procedural due process complaint as she was represented by counsel and participated in the grounds phase. Procedural due process ensures "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" ***Brown Cnty. v. Shannon R.***, 2005 WI 160, ¶64, 286 Wis. 2d 278, 706 N.W.2d 269 (citation omitted); ***Mathews v. Eldridge***, 424 U.S. 319, 333 (1976). A challenged statute is entitled to a presumption of constitutionality, and the burden is upon the challenger to show that the statute is unconstitutional beyond a reasonable doubt. ***P.P. v. Dane Cnty. DHS***, 2005 WI 32, ¶¶16, 18, 279 Wis. 2d 169, 694 N.W.2d 344.

¶22 Here, Beverly H. argues that her due process rights were violated because she was not allowed an adjournment in the second phase, which determines what is in the best interests of the children. However, she was on notice that the trial court would be proceeding to the dispositional hearing following the jury's verdict. Both trial courts advised her that the dispositional hearing would, in all likelihood, take place immediately after the return of the jury verdict. In addition, her attorney was aware of WIS. STAT. § 48.424(4) because the attorney referenced it in his argument to the court seeking an adjournment. Beverly H. was permitted to be heard in a "meaningful time and in a meaningful

hearing." She testified at the dispositional hearing. As to her witnesses, Beverly H. failed to make an offer of proof that any of the witnesses that she wished to present were essential to the dispositional hearing. In addition, the trial court assumed that Beverly H. had bonded with the children, thereby eliminating the need for a bonding assessment. Moreover, Beverly H.'s claim now that she wanted an adjournment is inconsistent with her comments to the trial court at the beginning of the TPR proceedings that she wanted no further delays. Thus, Beverly H.'s procedural due process rights were not violated. For the reasons stated, this court affirms.

By the Court.—Orders affirmed.

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