COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 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. 2011AP1403
2011AP1423

Cir. Ct. No. 2009TP150

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LEMAR T.,

RESPONDENT-APPELLANT,

ANASTASIA S.,

RESPONDENT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ANASTASIA S.,

RESPONDENT-APPELLANT,

LEMAR T.,

RESPONDENT.

APPEAL from an order[1] of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 CURLEY, P.J. On appeal, Lemar T. and Anastasia S. both argue that the trial court erred in finding that the ground alleged by the State—that their daughter Ariel T. was a child in continuing need of protection or services ("CHIPS") as found in WIS. STAT. § 48.415(2), was met. They contend that because this ground requires the Bureau of Child Welfare (Bureau) to make reasonable efforts to provide services ordered by the CHIPS court, and the trial court specifically found that the Bureau never offered certain ordered services to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10). This court, on its own motion, has consolidated the two appeals for dispositional purposes. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Pursuant to WIS. STAT. RULE 809.107(6)(e), this court is required to issue a decision involving termination of parental rights ("TPR") appeals within thirty days after the filing of the reply brief. We may extend that deadline pursuant to WIS. STAT. RULE §809.82(2)(a) for good cause. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). Good cause is found and this court now extends the decisional deadline in these matters through the date of this decision.

them, the trial court erred. This court disagrees. Because the record supports the trial court's finding that the Bureau made reasonable efforts to provide Anastasia S. and Lemar T. with services, this court affirms.[2]

I. BACKGROUND.

¶2 Ariel T. was born on September 11, 2007. The child was taken into protective custody on November 29, 2007, after a referral was made to the Bureau about possible domestic abuse, possible drug dealing in the home by Lemar T., and Anastasia S.'s cognitive delays and mental health issues which compromised her ability to care for Ariel T. Ariel T. was found to be a child in need of protection or services (CHIPS) on May 13, 2008, and was placed outside the home. A dispositional order was entered on August 21, 2008, by Judge William Pocan. An extension of the dispositional order was entered on March 2, 2009. Among Judge Pocan's many orders was a requirement that the Bureau make referrals for the following services for both parents: parenting education, nurturing program, life skill education, anger management, and domestic abuse counseling. In addition, the court ordered the Bureau to provide a psychiatric evaluation and a parenting assistant for Anastasia S. For Lemar T., the Bureau was ordered to set up random urine analysis, provide AODA treatment, and provide a psychological evaluation. The Bureau offered Anastasia S. and Lemar T. many, but not all, of the ordered services. Neither Anastasia S. nor

[2] Anastasia S. has asked for both publication of the decision and oral argument. However, WIS. STAT. § 809.23(1)(b)4. does not permit the publication of one-judge opinions. With regard to oral argument, this court rarely orders oral arguments in a one-judge case and declines to do so here.

Lemar T. was offered life skills education, and Anastasia S. did not have a parent assistant until after the grounds trial.

¶3 A petition to terminate the parental rights of both Lemar T. and Anastasia S. was filed on May 28, 2009. As grounds for the termination, the petition alleged that Ariel T. had a continuing need for protection and services as set forth in WIS. STAT. § 48.415(2),[3] and that both parents had failed to assume

[3] WISCONSIN STAT. § 48.415(2) provides:

> CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:
>
> (a) 1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
>
> 2. a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.
>
> b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.
>
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 9-month period following the fact-finding hearing under s. 48.424.

(continued)

parental responsibility as set forth in WIS. STAT. § 48.415(6). The State proceeded only on the first ground.

¶4 A court trial on the grounds phase was held In October 2010. Dr. Kenneth Sherry, a psychologist, who had examined Anastasia S. both in 2010 and several years earlier, testified. He opined that Anastasia S. was diagnosed with Attention Deficit Hyperactive Disorder and Mood Disorder. According to the doctor, Anastasia S.'s IQ scores placed her in the borderline range. With regard to the care of Ariel T., in his report, which was admitted into evidence, Dr. Sherry wrote that:

> I have doubts whether the client would be able to manage herself and the child in an independent fashion…. Anastasia[S.] presents as cognitively compromised and that is a concern. There are issues related to general instability and emotional volatility that have been longstanding and are unresolving. It is my opinion the client is not competent to manage [Ariel T.] in an independent and functional manner. I do believe that if the child was left in Anastasia[S.]'s independent care on a full-time basis, the child would be at risk of harm, again, not due to intentional malice, but due to neglect [as a result of] Anastasia[S.]'s limited parental and adult capacities.

¶5 Dr. Sherry also conducted an evaluation of Lemar T. Lemar T. also scored in the borderline range of intelligence. Dr. Sherry wrote:

> (am) 1. That on 3 or more occasions the child has been adjudicated to be in need of protection or services under s. 48.13 (3), (3m), (10) or (10m) and, in connection with each of those adjudications, has been placed outside his or her home pursuant to a court order under s. 48.345 containing the notice required by s. 48.356 (2).
>
> 2. That the conditions that led to the child's placement outside his or her home under each order specified in subd. 1. were caused by the parent.

> When the assessment is taken as a whole, it is clear that [Lemar T.] is an individual who is quite compromised cognitively. This is a man who has a sense of himself that he is able to manage in a full adult capacity. However, I think that is an over-estimate of his ability …. This is an individual who shows very limited parental capacity.… [Lemar T.] … is now involved in nurturing classes. That likely could be helpful, but it certainly will not be curative when considering the global deficits for this individual.

¶6 At trial, various workers testified to the services provided to both Lemar T. and Anastasia S. With regard to Lemar T., two case managers who were assigned to this case at different times testified that he was hard to reach because he had no actual home or permanent address. In turn, this lack of communication made it difficult to refer him for services. According to their testimony, Lemar T. did not regularly exercise his right to supervised visitation with Ariel T., and when he did visit, he could not care for her basic needs. Lemar T. moved to Illinois during the pendency of the case and also was incarcerated for a time, disrupting his visitations with Ariel T. The case manager also remarked that Lemar T. was not in compliance with the requirement that he receive AODA treatment. Admitted into evidence were thirteen lab reports from August and September 2010, which reflected that Lemar T. tested positive in all thirteen for marijuana and tested positive in one for cocaine. Lemar T. failed to attend individual therapy despite being referred to a provider. This referral was to a batterer intervention program. Lemar T. was also unable to complete nurturing and parenting classes that were provided to him by his case worker. Lemar T. never met the condition in the dispositional order to have a "safe, suitable, and stable home." However, Lemar T. was not offered one of the ordered services, a life skills program, principally because the Bureau only offered this program to children who were aging out of foster care.

¶7 The two case managers also gave testimony regarding Anastasia S. The first one referred Anastasia S. for nurturing and parenting classes. While she successfully completed these classes, her current case manager had recently recommended that she take a refresher course in parenting because she believed it was needed. The evidence produced at the grounds trial for Anastasia S. revealed that Anastasia S. had been referred for supervised visitation, individual therapy, and had a payee who took care of her finances. She also was seeing Dr. Erdman for psychiatric care. One of the case managers explained that the payee took Anastasia S. food shopping and provided other transportation for her, worked on her budget, and also assisted with life skills.

¶8 As a result of these experiences, the payee expressed concern to the case manager over Anastasia S.'s abilities, explaining that Anastasia S. could not shop for groceries by herself because she does not comprehend the cost of individual items, nor does she have the ability to pay her own bills. According to the case manager, the therapist had advised her that Anastasia S. had made improvements in many areas, but the therapist still had major concerns about Anastasia S.'s ability to parent.

¶9 The therapist further related that Anastasia S. was still very impulsive and has "lifestyle boundary issues" which could endanger Ariel T. The therapist also told the case manager that she feels she has done all she can for Anastasia S., and that Anastasia S.'s cognitive delays prevented her from further improvement.

¶10 The case worker who originally supervised Anastasia S.'s visitations with Ariel T. also testified to several incidents that required her intervention. One such incident was when Anastasia S. was cutting food on the counter with a sharp

knife and Ariel T.'s fingers were in the area being used for cutting. The case worker also told the court that she could not recommend unsupervised visits for Anastasia S. because of safety issues. Another witness told the court that the worker supervising visitation went above and beyond her duties and helped Anastasia S. in her parenting, giving her tips such as a parental aide would do.

¶11 In sum, all the witnesses testified that Anastasia S. was cooperative and highly motivated, but despite her cooperation, none of the witnesses was of the opinion that Anastasia S. could safely parent Ariel T. without assistance. This was due primarily to Anastasia S.'s cognitive problems.

¶12 At the grounds trial, questions arose concerning one of the conditions listed on the order extending the dispositional order. The order directed the Bureau to refer Anastasia S. to a parent assistant. The first case manager testified that she had referred Anastasia S. to a one-on-one parenting educator who helped Anastasia S. with her parenting skills. This case manager defined a parenting assistant as "[s]omeone who is going to work one-on-one with the parents to enhance parenting skills." The first case manager believed that this condition had been fulfilled by the individual one-on-one parenting program. The second case manager had a different view of the need for a parenting assistant. The second case manager testified that had she been the earlier case manager, she would have had Anastasia S. finish the parenting education first, and then the nurturing class, and "when we got closer to reunification if we got close to reunification supervised visitation was going successful I would implement at that time a parent assistant within the home." In any event, the successor case manager had not, at the time of the grounds trial, referred Anastasia S. to a parent assistant.

¶13 After the close of testimony the trial court, in a letter decision, found that the grounds had been met and that Anastasia S. and Lemar T. were unfit. The trial court, however, was highly critical of the actions taken by the Bureau with regard to the order that Anastasia S. receive a parenting assistant. In its decision, the trial court noted:

> Four years ago, a judge determined that a parent assistant was a mandated and appropriate service necessary to assist that Anastasia [S.] in meeting the conditions of safe return. To this very moment, BMCW has not made a referral for that service; no parent aide has ever been in the home or attempted to assist Anastasia[S.] in gaining the competence necessary to safely parent Ariel[T].
>
> BMCW's rationale—Anastasia [S.] was not ready for reunification. I emphatically respond:
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> 1. The court order did not mandate the service when Anastasia [S.] was ready for reunification.
>
> 2. One can argue that if BMCW had provided the service they were ordered to provide, she may have been ready for reunification.
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> Exacerbating this disregard of the specific provisions of the order, the credible evidence establishes that Anastasia [S.] repeatedly requested the implementation of the service throughout the course of BMCW's involvement.
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> Social workers need some leeway in exercising professional judgment in implementing court ordered services—for the protection and assistance of their clients and to maintain the integrity of the process. Four years of disregard of a specific order because the agency substitutes its judgment as to the timing, appropriateness and necessity of the service is not the exercise of reasonable professional judgment; it is a blatant disregard of the court order. If the service was not appropriate given developments in the case, a revision of the order should have been pursued (or the agency should have advocated the order accord the discretion they unilaterally assumed in the first instance).
>
> Hence, the State and GAL are left to tap dance around the Bureau's disregard. "Minor or insignificant deviations from the court's order" do not preclude a finding of reasonable efforts by BMCW. Wis. JI 324. The essence

> of their dance is that the in-home visitation and the in-home parenting classes are the substantial equivalent of parent aide services.

(Footnotes omitted.) As a result, following the grounds trial, the Bureau referred Anastasia S. to a parenting assistant who worked with her between the grounds trial and the dispositional trial—less than two months.

¶14 At the dispositional hearing, the trial court heard from the case worker who described her efforts in getting a parent assistant for Anastasia S. and drug counseling and other services for Lemar T. She advised the court that Lemar T. made some progress right after the grounds trial, but then he simply refused to cooperate. He was dismissed from the drug program for not appearing and did not follow through with any of the other offered services. The case manager also told the court she was in contact with Anastasia S.'s counselor and Anastasia S. had "fired her." The case manager also told the court that she overheard a conversation between Anastasia S. and Lemar T. The case manager related that Anastasia S. said she was going to beat up the foster parent if she got Ariel T. The parent assistant told the court of her observations of Anastasia S. with Ariel T. since the grounds trial. Finally, the foster mother testified to the close bond that had developed between herself and Ariel T. and expressed her desire to adopt Ariel T.

¶15 The trial court reviewed the history of the case and ultimately found that it was in Ariel T.'s best interest if Anastasia S.'s and Lemar T.'s parental rights were terminated. The trial court did permit Anastasia S. and Lemar T. supervised visitation until the appeal is concluded.

II. ANALYSIS.

¶16 The decision to terminate a person's parental rights to a child is vested within the trial court's discretion, provided that the statutory grounds to termination are satisfied. ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993); ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). We will not reverse a trial court's discretionary decision if the trial court applied the relevant facts to the correct legal standard in a reasonable way. ***Brandon S.S.***, 179 Wis. 2d at 150 ("The exercise of discretion requires a rational thought process based on examination of the facts and application of the relevant law."). We review *de novo* whether the trial court has applied the correct legal standard. ***Kerkvliet v. Kerkvliet***, 166 Wis. 2d 930, 939, 480 N.W.2d 823 (Ct. App. 1992).

¶17 Wisconsin has a two-part procedure for the involuntary termination of parental rights. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. At the first, or "'grounds'" phase of the proceeding, the petitioner must prove that one or more of the statutory grounds for termination of parental rights exist. ***Id.***; *see also* WIS. STAT. § 48.31(1). There are twelve statutory grounds of unfitness for an involuntary termination of parental rights under WIS. STAT. § 48.415(1)-(10), and if a petitioner proves one or more of the grounds for termination by clear and convincing evidence, "'the court shall find the parent unfit.'" ***Steven V.***, 271 Wis. 2d 1, ¶25 (citing WIS. STAT. § 48.424(4)). "A finding of parental unfitness is a necessary prerequisite to termination of parental rights, but a finding of unfitness does not necessitate that parental rights be terminated." ***Steven V.***, 271 Wis. 2d 1, ¶26. "Once the court has declared a parent unfit, the proceeding moves to the second, or dispositional phase, at which the child's best interests are paramount." ***Id.*** "At the dispositional phase, the court is called upon

to decide whether it is in the best interest of the child that the parent's rights be permanently extinguished." ***Id.***, ¶27.

¶18 "Grounds for termination [of parental rights] must be proven by clear and convincing evidence." ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 682, 500 N.W.2d 649 (1993). According to WIS. STAT. § 48.415(2)(a)2., the Bureau must make a "reasonable effort" to provide the services ordered by the court. "'[R]easonable effort' means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child[,] … the level of cooperation of the parent[,] … and other relevant circumstances of the case." ***Id.***

¶19 Lemar T. and Anastasia S. claim that the Bureau failed to engage in reasonable efforts to provide them with services they needed in order to comply with the conditions for the return of their child. The trial court found that the Bureau did make reasonable efforts in this case. This court will affirm the trial court's finding unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶20 One of the case managers for Lemar T. testified that she made the following referrals: a psychological examination, supervised visitation, AODA treatment with random urine screens, individual therapy, domestic violence and anger management classes, and nurturing and parenting classes. In response, she claimed that Lemar T. did not regularly attend supervised visitation, made no progress in basic parenting skills, and never demonstrated that he could care for Ariel T. properly. Indeed, Lemar T. flunked every drug test that he was given. He was unable or unwilling to complete any of the services offered to him except the psychological examination and an occasional supervised visitation. Moreover, Lemar T. never requested a referral for any other services. While the Bureau did

not refer Lemar T. for life skills education, his case manager testified that the Bureau does not have a life skills education class and that the skills taught in this type of class are issues involving independence and living services which would be provided in some of the other services for which Lemar T. was referred.[4]

¶21 With respect to Lemar T. the trial court stated in a footnote in its written decision, following the grounds trial, that grounds for termination have been proven to a reasonable certainty, stating: "I reject rather summarily Lemar [T.]'s assertions that BMCW's efforts were lacking with respect to him. BMCW's efforts were not lacking; his efforts were lacking. He reciprocated none of the efforts to engage him other than visitation. His highly self-destructive proclivity towards substance abuse was a much higher priority in his existence than engaging the services offered and gaining parental competence."

¶22 These findings are not clearly erroneous. The record is rife with examples of Lemar T.'s failure to meet the conditions that would have returned Ariel T. to his care and custody. Lemar T. tested positive in every drug test he took. Various workers testified that often his whereabouts were unknown as he had no permanent address and he failed to keep the Bureau informed as to where he could be reached, making it difficult to refer Lemar T. for services. Further, Lemar T.'s nomadic lifestyle and eventual move to Illinois made Lemar T.'s fulfilling the conditions of return extremely problematic. Lemar T. did not complete any of the offered services. In addition, Lemar T.'s cognitive problems exacerbated the completion of many of the referred services. Further, Lemar T.

[4] It should be noted that after the dispositional trial held in October 2010, Lemar T.'s case manager referred him for home management services, among many offered services, but Lemar T. did not follow up with the appointment.

had services available to him that replicated the life skills education program originally ordered by Judge Pocan, but, as noted, he completed none of them.

¶23 A relevant consideration in determining "'reasonable effort'" to provide services is the parents' "level of cooperation." WIS. STAT. § 48.415(2)(a)2.a. Lemar T.'s transient lifestyle, his inability to finish any classes, and his persistent drug use reflected a low level of cooperation which, in turn, hampered the Bureau's ability to help him meet the conditions for the return of Ariel T. Given the overall picture, the trial court easily and properly concluded that the Bureau had made reasonable efforts to provide Lemar T. with the court ordered services.

¶24 The conduct of Anastasia S. during the pendency of these proceedings was significantly different than that of Lemar T. Anastasia S. was motivated and cooperative in her desire to be reunited with her daughter. She completed all the classes that she was sent to and had regular supervised visitations with Ariel T. While the testimony reflected Anastasia S.'s desire to be reunited with her daughter, most of the people who witnessed Anastasia S.'s interaction with Ariel T. felt that Anastasia S. was incapable of parenting Ariel T. by herself. Anastasia S. worked hard at reuniting with her daughter, but she simply does not have the capacity to parent a child. Anastasia S. was easily distracted, had trouble staying on task and had poor judgment. Anastasia S. continued to permit Lemar T. live in her apartment despite their continual fighting, and the worker who supervised visitation suspected that Anastasia S.'s black eyes were the result of beatings, not falls as Anastasia S. suggested. The worker also described several incidents where Ariel T. would have been harmed but for the intervention of the worker. After several years of supervised visitation, the worker

still needed to prompt Anastasia S. to do certain activities necessary for the care of Ariel T.

¶25 Although the first case manager believed a parental aide was provided to Anastasia S., much was made of the failure of the second case worker to put a parent assistant in Anastasia S.'s home prior to the grounds trial. The trial court listed the many referrals given to Anastasia S. As noted, the only program called life skills education was for children aging out of foster care. Thus, Anastasia S. was not offered this particular class. The trial court summarized the situation by writing in its letter decision following the grounds trial:

> I recognize that a parent aide would have addressed those issues in a more structured and consistent manner. However, if Ms. Warren had been denominated a supervised visitation worker and parent aide, I do not believe anyone could have reasonably challenged the propriety of the moniker. Trite colloquialisms strike me as inappropriate when addressing profoundly intimate interests—and no one can doubt how profoundly intimate this issue is in Ariel [T.]'s parents[']' lives. However, I can't help but conclude that this is simply a matter of semantics. BMCW put a truckload of individualized services into Anastasia [S.]'s home; all of them directly and indirectly addressing parent assistant and life skills issues. The fact that none of those service providers bore the title of parent assistant or life skills mentor is of no substantive significance. Anastasia [S.] received the substantive services that the order anticipated.

This court agrees. Anastasia S. had the substantial equivalent of a parent assistant before the grounds trial and an actual parent assistant after the grounds trial through the dispositional trial. Neither Lemar T. or Anastasia S. attended a life skills education course, but comparable services were provided in other ordered programs. Thus, the finding that the Bureau did make reasonable efforts to provide the services ordered by the court is not clearly erroneous. Despite the many programs, classes and aides given to Anastasia S., Anastasia S., through no

fault of her own, was simply unable to independently parent Ariel T. On the other hand, Lemar T.'s lack of cooperation led the trial court to find him unfit. Given the trial court's findings, the trial court properly exercised its discretion in finding that Ariel T.'s best interest lie with adoption.

¶26 For the reasons stated, the order of the trial court terminating the parental rights of Lemar T. and Anastasia S. is affirmed.

By the Court.—Order affirmed.

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