COURT OF APPEALS
DECISION
DATED AND FILED

August 9, 2012

Diane M. Fremgen
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 No. 2012AP1059 **Cir. Ct. No. 2011TP9**

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

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

GRANT COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

ELIZABETH M. R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Grant County: ROBERT P. VANDEHEY, Judge. *Reversed*.

¶1 SHERMAN, J.[1] Elizabeth R. appeals from an order of the circuit court terminating her parental rights (TPR) to Ellie R. Elizabeth argues the circuit court erroneously exercised its discretion in finding that termination was in Ellie's best interests. I agree and therefore reverse.

BACKGROUND

¶2 In September 2011, the Grant County Department of Social Services filed a petition seeking the involuntary termination of Elizabeth's parental rights to Ellie, who was born on February 7, 2007.[2] The County alleged five grounds for termination: (1) Ellie was in need of continuing protection and services; (2) child abuse; (3) Elizabeth had failed to assume parental responsibility; (4) Ellie was the product of incestuous parenthood, a ground later dismissed because Elizabeth was a victim; and (4) Elizabeth had committed a serious felony. *See* WIS. STAT. § 48.415(2), (5), (6), (7), and (9m). Elizabeth contested the petition and the matter was tried to the court.

¶3 The County moved for summary judgment on the grounds phase based upon Elizabeth's prior conviction for two counts of child abuse in violation of WIS. STAT. § 948.03. The victim of that abuse was Ellie, who suffered "deep 2nd-degree burns to both feet" and first-degree burns on her hands. The circuit court granted the County's motion and case proceeded on to the disposition phase.

[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] The parental rights of Ellie's father were voluntarily terminated.

¶4 A disposition hearing was held in February 2012. Following that hearing, the circuit court found that termination of Elizabeth's parental rights was in Ellie's best interest and, in accordance with that finding, issued an order terminating those rights. Elizabeth appeals. Additional facts will be discussed below as necessary.

DISCUSSION

¶5 Elizabeth and the guardian ad litem (GAL) argue that the circuit court erroneously exercised its discretion when it determined that it was in Ellie's best interest to terminate Elizabeth's parental rights.

¶6 The procedure for involuntary termination of parental rights is a two-step process. ***Steven V. v. Kelley H.***, 2003 WI App 110, ¶18, 263 Wis. 2d 241, 663 N.W.2d 817. The first step is the fact-finding hearing to determine whether grounds exist for termination. ***Id.*** At this stage, the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist. WIS. STAT. § 48.31(1). If all of the elements of a statutory ground have been established, the circuit court must find the parent to be unfit. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶25, 271 Wis. 2d 1, 678 N.W.2d 856.

¶7 The second step is the disposition phase where the court must decide whether termination of the parent's rights is in the best interest of the child. ***Id.***, ¶27; WIS. STAT. § 48.426(2). The ultimate determination of whether to terminate parental rights is within the circuit court's discretion and will not be reversed if the court applied the correct legal standard to the facts at hand. ***State v. Margaret H.***, 2000 WI 42, ¶¶27, 32, 234 Wis. 2d 606, 610 N.W.2d 475.

¶8 Elizabeth asserts that the circuit court failed to give adequate consideration to all of the statutory factors a court is to consider when determining whether termination of parental rights is in a child's best interest and, thus, the court erroneously exercised its discretion when it concluded that it was in Ellie's best interest to terminate Elizabeth's parental rights.

¶9 WISCONSIN STAT. § 48.426(3) sets forth the factors a court must examine in determining whether the termination of parental rights is in the best interests of the child. It provides:

> 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.

Section 48.426(3).

¶10 Elizabeth claims that the court failed to give proper consideration to the third factor—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. WIS. STAT. § 48.426(3)(c) has been interpreted "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.

¶11 Elizabeth argues that the court considered her family and the family of her fiancé, but "failed to address Ellie's relationship with Elizabeth, and consequently, whether there would be harm to Ellie in severing that relationship." Elizabeth argues that the court, by failing to give proper consideration to Ellie's relationship with Elizabeth, failed to apply the appropriate legal standard, which constituted an erroneous exercise of the court's discretion.

¶12 Grant County Department of Social Services does not dispute Elizabeth's assertion that the court failed to give proper consideration to WIS. STAT. § 48.426(3)(c) and that the failure to do so was an erroneous exercise of the court's discretion. It is well established that unrefuted arguments are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Furthermore, the record supports Elizabeth's assertion.

¶13 In ***Margaret H.***, the supreme court discussed how and to what extent a circuit court should address the statutory factors. ***Margaret H.***, 234 Wis. 2d 606, ¶35-36. The court stated, "While it is within the province of the circuit court to determine where the best interests of the child lie, the record should reflect adequate consideration of and weight to *each* factor." ***Id.***, ¶35 (emphasis added). ***Margaret H.*** held that the exclusive focus on any one factor is inconsistent with

the plain language of WIS. STAT. § 48.426(3) and thus an erroneous exercise of discretion. ***Id.*** The supreme court observed in ***Margaret H.*** that § 48.426(3)(c) "unambiguously require[s] 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." ***Id.***, ¶21.

¶14 In the present case, the court's consideration of WIS. STAT. § 48.426(3)(c) was limited to the following:

> Whether the child has substantial relations with a parent or other family members and whether it would be harmful to sever those relationships, [Elizabeth's fiancé's] family is one thing, and it seems that he is a positive influence; however, when you look at [Elizabeth's] family, there is not much there that we would want to encourage by way of relationships, and [Ellie's father's] rights have been terminated already.

The court evaluated the effect of the severance on the relationship between Ellie and Elizabeth's family and the family of Elizabeth's fiancé. However, the court did not evaluate whether Ellie has a substantial relationship with Elizabeth, or the effect the severance on the relationship between Ellie and Elizabeth would have on Ellie. And as pointed out by Elizabeth, the record reflects that there was testimony by multiple witnesses that Elizabeth and Ellie had a relationship and that the termination of that relationship would be harmful to Ellie.

¶15 The County argues that notwithstanding the circuit court's failure to give proper consideration to WIS. STAT. § 48.426(3)(c), the court's decision to terminate Elizabeth's parental rights should be upheld because the overall record supports the court's determination that termination was in Ellie's overall best interest.

¶16 In ***Margaret H.***, the supreme court determined that the circuit court in that case failed to give proper consideration to all of the WIS. STAT. § 48.426(3) factors, which the court concluded constituted an erroneous exercise of the court's discretion because the court failed to apply the appropriate legal standard. ***Margaret H.***, 234 Wis. 2d 606, ¶36. The State asked the supreme court to decide as a matter of law the issue of termination, rather than remand the matter to the circuit court to evaluate the § 48.426(3) factors. ***Id.*** The court declined the State's request. The court observed that when faced with inadequate findings, an appellate court may:

> 1) look to an available memorandum for findings and conclusions; 2) review the record anew and affirm if a preponderance of evidence clearly supports the judgment; 3) reverse if the judgment is not so supported; or 4) remand for further findings and conclusions.

Id., ¶37. The court stated, however, that it has "expressed a preference for remanding to the circuit court when confronted with inadequate findings, particularly in family law or domestic relations actions." ***Id.***, ¶38. The court observed that "[a]n examination of the record is seldom adequate to render factual determinations that lie squarely within the province of the circuit court." ***Id.*** Whether Ellie has a substantial relationship with Elizabeth, and whether the severance of their relationship would be harmful to Ellie requires an examination of the record and factual findings. Accordingly, I decline the County's request and remand the case. On remand, the circuit court must set forth on the record its evaluation of all the applicable factors enumerated under WIS. STAT. § 48.426(3), including subsection (c), while focusing on Ellie's best interest.

CONCLUSION

¶17 For the reasons discussed above, I reverse.

By the Court.—Order reversed.

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