COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2016

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. 2016AP1981 **Cir. Ct. No. 2015TP8**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO J. M. H., A PERSON UNDER THE AGE OF 18:

T. M. H.,

PETITIONER-RESPONDENT,

V.

A. N. W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waushara County: GUY D. DUTCHER, Judge. *Reversed and cause remanded.*

¶1 BLANCHARD, J.[1] J.H.'s biological father filed a petition seeking to terminate the parental rights of J.H.'s biological mother, A.W., which was granted by the circuit court. A.W. appeals. I agree with A.W.'s argument, which requires some background information to understand.

¶2 During the dispositional phase of the termination proceedings, the court properly focused on whether termination of A.W.'s rights would be in the best interests of J.H. This included consideration of the following two undisputed facts, which were proper considerations: that J.H.'s stepmother intended to adopt J.H. if the court terminated A.W.'s parental rights, and that J.H. had an especially important relationship with his great-grandmother on his mother's side, who had visitation rights to J.H. under a prior court order. Given the importance of the J.H.-great-grandmother relationship to J.H., the court concluded that it "absolutely, positively" would not terminate A.W.'s rights unless it had authority to order continued visitation by the great-grandmother. The court concluded that it possessed the authority, specifically an equitable authority, to order continuation of the great-grandmother's visitation rights. Based on its conclusion that this precondition could be met and its understanding that the adoption by the stepmother would occur, the court terminated A.W.'s rights to J.H.

¶3 With that background, A.W. argues that the court erroneously exercised its discretion in granting the termination because the court lacked authority to order that the great-grandmother's visitation with J.H. continue following the termination and contemplated adoption, and thus the precondition of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

continued visitation for the great-grandmother could not be met. I agree with A.W. that the court lacks authority to order continued visitation following the termination and J.H.'s adoption because, under pertinent statutes, termination and adoption would sever all of the great-grandmother's legal rights to the child. As a result, in my view, a precondition for the court's decision to terminate A.W.'s rights was based on a mistaken understanding of the court's authority. For this reason alone I reverse the order terminating A.W.'s parental rights to J.H., and remand for further proceedings consistent with this opinion.

BACKGROUND

¶4 The following pertinent facts are undisputed. J.H.'s biological father filed a petition to terminate the rights of J.H.'s biological mother, A.W., to J.H. J.H. was 6 years old at the time the petition was filed. Both A.W. and the guardian ad litem representing J.H.'s best interests challenged the petition. In the grounds phase of the proceedings, the circuit court entered a default judgment based on repeated missed court appearances by A.W. A.W. does not challenge the grounds decision.

¶5 The court held a dispositional hearing to determine whether terminating A.W.'s rights would be in J.H.'s best interests. The court recognized that the stepmother was willing to adopt J.H. if the court terminated A.W.'s parental rights. The court explained that it had only one problem with ordering termination followed by adoption. The problem, in the court's view, was that J.H.'s ongoing relationship with the great-grandmother is so critical that severing that relationship would not be in J.H.'s best interests, even with the termination and the adoption orders in place.

¶6 The father's attorney acknowledged that the J.H.-great-grandmother relationship is important, and indicated that the father did not intend to sever that relationship after termination and adoption. The court questioned this, however, noting that J.H.'s father and the great-grandmother have a "contentious, untenable relationship," such that the father could be expected to interfere with the great-grandmother's visitation rights if the court's rulings effectively gave the father control over the great-grandmother's access to J.H.

¶7 With that background, the court authorized the termination of A.W.'s parental rights, with the direction that the order granting the great-grandmother visitation that had been in place before the termination of parental rights proceedings commenced was to remain in place after J.H.'s anticipated adoption. The court explained its reasoning in detail, as follows:

> [E]xercising my equitable authority, [because] this is a Court of equity, [I] authorize this termination of parental rights with this specific unequivocal directive[:] … that the termination of parental rights does not in any way, shape, or form sever, limit, or otherwise impede the placement order issued by this Court in [an earlier proceeding related to custody, placement, and visitation rights to J.H.] as it relates to the relationship between [J.H.] and his maternal great grandmother.
>
> And I am terminating the parental rights of his mother and investing [the great-grandmother] with all of the placement rights continuing as they existed under [the earlier court order referenced above]; and they are unfettered, unmitigated, and will not be in any way, shape or form impeded. And I do so under the equitable authority that I have to recognize the critical nature of this relationship between Great Grandmother and the child whose best interests I am responsible for. So that order continues and will continue to dictate what happens with regard to placement, whether it has to do with the termination of parental rights that has taken place or whether or not it has to do with any adoption .... So I sever [A.W.] from the formula, but I am not taking [the great-grandmother] out of [the] equation.

The court emphasized that, if it was without the equitable authority to continue the great-grandmother's visitation after the termination and adoption, it "absolutely, positively would not" order the termination of A.W.'s rights.

¶8 The court explained that its ruling took into consideration the statute addressing "visitation rights of certain persons," WIS. STAT. § 767.43, and the visitation rights statute that applies in the event of adoption, WIS. STAT. § 48.925. However, the court stated that the great-grandmother's situation had "technical shortcomings" in that it failed to meet certain requirements for visitation under these statutes. Nevertheless, the court concluded that, pursuant to ***Holtzman v. Knott***, 193 Wis. 2d 649, 533 N.W.2d 419 (1995), these shortcomings did not prevent the court from exercising its equitable authority to order continued visitation after the termination and adoption.

¶9 The court entered an order terminating A.W.'s parental rights, which A.W. appeals. The guardian ad litem does not file a separate brief on appeal, but joins A.W. in requesting reversal of the order terminating A.W.'s parental rights.

DISCUSSION

¶10 A.W. argues that the court erroneously exercised its discretion at the dispositional phase because the court concluded that it could terminate A.W.'s rights based on the incorrect premise that the court had equitable authority to order that the great-grandmother's visitations with J.H. continue following the termination and contemplated adoption by the stepmother. I agree with A.W.

¶11 In the following discussion, I first set forth the pertinent legal standards for the dispositional phase of a termination of parental rights and appellate review of a court's dispositional decision. I then discuss the pertinent

Wisconsin visitation rights statutes and precedent and describe why I conclude that the statutes and case law establish that termination of A.W.'s rights and adoption by the stepmother would sever all of the great-grandmother's legal rights to J.H. and that, under these circumstances, the court lacks equitable authority to order continued great-grandmother visitation following termination and adoption.[2]

Pertinent Legal Standards

¶12 A circuit court's decision whether to terminate parental rights is discretionary. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). Generally speaking, "[a] circuit court acts within its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach." ***Bank Mut. v. S.J. Boyer Constr., Inc.***, 2010 WI 74, ¶20, 326 Wis. 2d 521, 785 N.W.2d 462. The question here is whether the court applied a proper standard of law.

¶13 In the dispositional phase of a petition to terminate parental rights, the circuit court's exercise of discretion requires the court to focus on the child's best interests and to consider six statutory factors. WIS. STAT. § 48.426(3). The parties' arguments are centered around two of the six factors—"(a) The likelihood of the child's adoption after termination," and "(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"—and the circuit court

[2] Consistent with ¶30, *infra*, I note that my conclusion about the court's lack of authority to order continued visitation is limited to the scenario in which the court would also order termination of parental rights and subsequent adoption. I do not address the potential viability of any order addressing visitation in the event that the court does *not* order termination and adoption.

here made clear that these two factors were central to the court's best interests determination. *See* WIS. STAT. § 48.426(3); ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶¶28-29, 255 Wis. 2d 170, 648 N.W.2d 402; ***Gerald O.***, 203 Wis. 2d at 153-54. To clarify regarding the first factor, there is no dispute in this appeal that the court could order the adoption, in itself. However, the court in part relied on the anticipated adoption in making its best interests determination, and as I discuss below the anticipated adoption is pertinent to the question of the court's authority to order continued great-grandmother visitation.

¶14 As indicated above, once an appropriate ground for termination has been established, a circuit court's decision to terminate parental rights turns on the child's best interests. *See* WIS. STAT. § 48.01(1) ("[T]he best interests of the child ... shall always be of paramount consideration."); WIS. STAT. § 48.426(2) ("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.").

¶15 As referenced above, in rendering its termination decision, the circuit court cited statutory provisions related to visitation rights. This included what might be called the general visitation rights statute, WIS. STAT. § 767.43. Section 767.43 has both a "grandparent visitation provision" and a "special grandparent visitation provision," that courts may apply in "actions affecting the family." *See* § 767.43(1) and (3). The grandparent visitation provision provides that "upon petition by a grandparent [or] great[-]grandparent ... the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child." Sec. 767.43(1).

¶16 On its face, WIS. STAT. § 767.43(1) would appear to provide the circuit court here with authority to order visitation for J.H.'s great-grandmother. However, while neither party calls it to my attention, our supreme court recently explained that "Wisconsin Stat. § 767.43(1) applies to grandparents [and great grandparents] of a child *of a married or formerly married couple*" and that grandparents of non-marital children are subject to § 767.43(3).[3] *See* ***Meister v. Meister***, 2016 WI 22, ¶¶28, 32, 367 Wis. 2d 447, 876 N.W.2d 746 (emphasis added). Because it is undisputed that J.H.'s parents were never married, the circuit

[3] WISCONSIN STAT. § 767.43(3) provides:

> **(3)** SPECIAL GRANDPARENT VISITATION PROVISION. The court may grant reasonable visitation rights, with respect to a child, to a grandparent of the child if the child's parents have notice of the hearing and the court determines all of the following:
>
> (a) The child is a nonmarital child whose parents have not subsequently married each other.
>
> (b) Except as provided in sub. (4), the paternity of the child has been determined under the laws of this state or another jurisdiction if the grandparent filing the petition is a parent of the child's father.
>
> (c) The child has not been adopted.
>
> (d) The grandparent has maintained a relationship with the child or has attempted to maintain a relationship with the child but has been prevented from doing so by a parent who has legal custody of the child.
>
> (e) The grandparent is not likely to act in a manner that is contrary to decisions that are made by a parent who has legal custody of the child and that are related to the child's physical, emotional, educational or spiritual welfare.
>
> (f) The visitation is in the best interest of the child.

court here could not have relied on WIS. STAT. § 767.43(1) to award visitation to J.H.'s great-grandmother. *See* ***Meister***, 367 Wis. 2d 447, ¶28.

¶17 Turning to WIS. STAT. § 767.43(3), the "special grandparent visitation provision" set forth above, although again neither party raises the issue, I conclude that the court could not rely on § 767.43(3) to order visitation for the great-grandmother under the unambiguous statutory language. Unlike sub. (1), which provides specifically for a "*great*-grandparent" to petition for visitation, sub. (3) omits this category and other categories listed in sub. (1) and provides for visitation only for a "*grandparent*" when a non-marital child is involved. *See* § 767.43(3)(a).

¶18 I refer to other pertinent visitation statutes and case law principles as necessary to further discussion below.

The Circuit Court's Order/J.H.'s Best Interests

¶19 I now turn to the circuit court's order terminating A.W.'s rights and address whether the court could rely on its equitable authority to issue an order that called for *both* (1) termination and adoption by the stepmother *and* (2) visitation by the great-grandmother. In other words, the issue here is whether the court has the authority to issue an order providing for the great-grandmother's continued visitation if it also orders termination of the mother's rights and adoption by the stepmother. As referenced above, the court concluded that it could rely on its equitable authority to order all under ***Holtzman***, 193 Wis. 2d 649. As I explain below, ***Holtzman*** and subsequent case law establish that a circuit court may use its equitable power to award visitation, but only in circumstances not addressed by the statutes, and because I conclude that pertinent statutes

address the circumstances here, I conclude that the court was without authority to issue the challenged order.

¶20 ***Holtzman*** involved a dispute over custody and visitation rights in a dissolving same-sex relationship. ***Id.*** at 659. Holtzman appealed a circuit court order denying her custody or visitation rights to the biological child of Holtzman's former partner, with whom Holtzman had raised the child from birth. The supreme court held that Holtzman was not entitled to custody, but also held that she was entitled to visitation. ***Id.*** at 657-59. The court concluded that the chapter 767 visitation statute did not apply to the situation but that a circuit court may use its "equitable power" to order "visitation under circumstances not included in the statute[s]." ***Id.*** at 658; *see also* ***Elgin W. v. Wisconsin Dep't of Health & Family Servs.***, 221 Wis. 2d 36, 47, 584 N.W.2d 195 (Ct. App. 1998) (observing that courts have equitable authority to order visitation in "extra-statutory situations"). In situations "not included in the statutes," "a circuit court may determine whether visitation is in a child's best interest if the petitioner first proves that he or she has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent." ***Holtzman***, 193 Wis. 2d at 658, 682. The court used a four-part test to define a parent-like relationship with a child, the specifics of which are not disputed in this appeal. *See* ***id.*** at 658-59.

¶21 Based on my review of ***Holtzman***, I conclude that the circuit court here could not rely on that case to preserve the great-grandmother's visitation rights for two related reasons: (1) precedent calls into doubt ***Holtzman***'s applicability to any proceeding involving termination and adoption; and (2) even if ***Holtzman*** could apply in some such situations, it cannot be applied in the instant circumstances because these circumstances are addressed in pertinent statutes,

which foreclose an order for continued visitation following termination and adoption.

¶22 My decision is dictated, in part, by ***Elgin W.***, which appears to be the only case that has applied ***Holtzman*** in the context of termination of parental rights and adoptions. *See* ***Elgin W.***, 221 Wis. 2d 36. In ***Elgin W.***, this court upheld a circuit court's conclusion that adoption of a child following the termination of both birth parents' rights precluded the child's maternal grandparents from establishing rights to custody, guardianship, or visitation as a matter of law. ***Id.*** The maternal grandparents stated that they were in the same position as the petitioner in ***Holtzman*** and that their petition for visitation stated an "equitable" claim, at least in part because, earlier in the termination proceedings, the grandparents had placement of the child. ***Id.*** at 38-39. This court explained that the situation in ***Holtzman*** was "significantly different" from the one in ***Elgin W.***, because ***Holtzman*** involved a custody dispute "in the context of the breakup of a longstanding, intact family," in which both "parents" were seeking custody, while ***Elgin W.*** involved terminations of the rights of both biological parents supported by a finding that it was likely that the child would be adopted after the termination. ***Elgin W.***, 221 Wis. 2d at 46.

¶23 The ***Elgin W.*** court distinguished ***Holtzman*** "not only on the facts but also [based on] the interplay of other statutes designed to promote and protect [the child's] best interests." ***Id.*** The court recognized that a circuit court has equitable authority in some circumstances, "as delineated in ***Holtzman***," but concluded that such equitable authority "should not trump the comprehensive, best-interest-of-the-child provisions of ch. 48, STATS.—particularly those dealing with termination of parental rights and adoption." ***Id.*** at 47. The ***Elgin W.*** court concluded that the grandparents did not have an equitable claim for visitation or

other rights to the child, stating that a court's equitable authority is not so "all-encompassing" "that a court may ignore statutes and case law to enable it to assist someone in trouble." ***Id.*** at 49 (citations and internal quotations omitted). The court expressed concern that allowing the grandparents' equitable claim to proceed would "run contrary not only to the termination-of-parental-rights and adoption laws themselves" but also "to the important public policy considerations underlying" the laws. ***Id.***

¶24 The concerns expressed in ***Elgin W.*** directly apply here. Because the circumstances here were contemplated by the legislature, as I discuss below, the circuit court lacks equitable authority to issue a decision contrary to the result dictated by the termination and adoption statutes. On this basis, I reject the father's argument that the court could rely on its equitable authority to order the visitation in conjunction with orders of termination and adoption.

¶25 The directives of the legislature governing terminations and subsequent adoptions are clearly established by the children's code, chapter 48 of the Wisconsin Statutes. The children's code addresses what happens to the legal rights of birth relatives of a child after an adoption, including the situation in which an adopted child had a previous relationship with a person or persons whose legal rights to the child have been severed by virtue of a termination of parental rights and a subsequent adoption. *See* WIS. STAT. §§ 48.92(2)[4] and 48.925.[5]

[4] WISCONSIN STAT. § 48.92(2) provides:

> After the order of adoption is entered the relationship of parent and child between the adopted person and the adopted person's birth parents and the relationship between the adopted person and all persons whose relationship to the adopted person is derived through those birth parents shall be completely altered and all the rights, duties, and other legal consequences of those

(continued)

Section 48.92(2) states that an adoption severs the relationship between the adopted child and the child's birth parent(s), and severs all relationships derived through the birth parent-child relationship. By definition, the great-grandmother's relationship with J.H. is a birth relationship that falls into this category when termination and adoption are ordered.

> relationships shall cease to exist, unless the birth parent is the spouse of the adoptive parent, in which case those relationships shall be completely altered and those rights, duties, and other legal consequences shall cease to exist only with respect to the birth parent who is not the spouse of the adoptive parent and all persons whose relationship to the adopted person is derived through that birth parent. Notwithstanding the extinction of all parental rights under this subsection, a court may order reasonable visitation under s. 48.925.

[5] WISCONSIN STAT. § 48.925 provides in pertinent part:

> **(1)** Upon petition by a relative who has maintained a relationship similar to a parent-child relationship with a child who has been adopted by a stepparent or relative, the court, subject to subs. (1m) and (2), may grant reasonable visitation rights to that person if the petitioner has maintained such a relationship within 2 years prior to the filing of the petition, if the adoptive parent or parents, or, if a birth parent is the spouse of an adoptive parent, the adoptive parent and birth parent, have notice of the hearing and if the court determines all of the following:
>
> (a) That visitation is in the best interest of the child.
>
> (b) That the petitioner will not undermine the adoptive parent's or parents' relationship with the child or, if a birth parent is the spouse of an adoptive parent, the adoptive parent's and birth parent's relationship with the child.
>
> (c) That the petitioner will not act in a manner that is contrary to parenting decisions that are related to the child's physical, emotional, educational or spiritual welfare and that are made by the adoptive parent or parents or, if a birth parent is the spouse of an adoptive parent, by the adoptive parent and birth parent.

¶26 It is true that, notwithstanding the fact that adoption severs all relationships stemming from the birth relationship, a court may grant visitation to relatives by birth if certain requirements are met, but those requirements are not met here. *See* WIS. STAT. §§ 48.92(2), 48.925. As potentially pertinent here, one requirement is that the person petitioning for visitation after his or her relationship has been severed by adoption must have maintained a relationship similar to a parent-child relationship with the child within 2 years prior to the filing of the petition for visitation. Section 48.925(1). The parties do not dispute the circuit court's finding here that, at least as of the time the court made its finding, the great-grandmother had not had such a relationship with J.H. in the two years prior to the termination of parental rights proceedings, and therefore under the explicit terms of § 48.925(1) no visitation could be ordered.

¶27 Consistent with the statutes cited above that speak to the topic, our supreme court has recognized the significant effects that adoption (and the termination of parental rights that often precedes adoption) has on the relationship between a birth family and a child. *See* ***State v. Margaret H.***, 2000 WI 42, ¶¶19-20, 234 Wis. 2d 606, 610 N.W.2d 475 (citations omitted) ("adoption severs the legal rights, connections, and duties between the birth family and the child. The termination of parental rights, which generally precedes an adoption, likewise yields the same outcome."). The termination of A.W.'s rights in this case would terminate the great-grandmother's visitation rights contained in the prior family court order. To repeat, this is not a case involving the dissolution of a non-traditional family, as in ***Holtzman***, where the circumstances were not contemplated by the statutes. Instead, this case involves a termination of parental rights and an anticipated stepparent adoption and, for reasons I have explained, the

circuit court lacks authority under the applicable statutes to order continued visitation rights for the great-grandmother.

¶28 The father's brief does not meaningfully attempt to address the interplay between the court's indisputably circumscribed equitable authority under ***Holtzman*** and the controlling statutes under the children's code. Similarly undeveloped is the father's argument regarding ***Holtzman***'s applicability in a proceeding involving termination and adoption, as opposed to its applicability to a divorce-type situation. Rather than respond directly to A.W.'s arguments regarding the applicability of ***Holtzman*** and its interplay with the statutes, the father's brief consists largely of references to facts in this case, which do not advance the legal analysis.

¶29 In sum, because the court determined that it was not in J.H.'s best interests to sever the great-grandmother's visitation rights, and explicitly stated that it would not have terminated A.W.'s parental rights if it lacked the authority to keep the great-grandmother's visitation rights intact following J.H.'s contemplated adoption, I reverse the order terminating A.W.'s parental rights and remand for further proceedings consistent with this opinion.

¶30 I note in closing that the circuit court here was presented with a difficult set of choices, given the circumstances and the available options under the law. The record reflects a thoughtful attempt by the court to fashion a disposition that would be in the child's best interests and that would be valid in light of a somewhat complex legal backdrop. My holding in this opinion is exclusively limited to the conclusion that the court lacked authority—based only on the facts of record *that have been developed thus far* and that have been called to my attention by the parties—to order continued visitation for the great-

grandmother after A.W.'s rights have been terminated and J.H. adopted by the stepmother. I do not intend to limit the circuit court's options in addressing any other topic, procedural or substantive, in future proceedings.

By the Court.—Order reversed and cause remanded.

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