COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2017

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 Nos. 2016AP2104
2016AP2105

Cir. Ct. Nos. 2015TP238
2015TP239

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO N.L.P., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

M. P.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

M. P.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: MARY E. TRIGGIANO, Judge. *Affirmed*.

¶1 BRASH, J[1]. M.P. appeals from orders terminating his parental rights for N.L.P. and M.P.P. He asserts that his trial counsel was ineffective for failing to object to testimony regarding the foster parents' proposed intent to allow contact to continue between M.P. and the children after the termination of parental rights was final, and seeks to vacate the termination of parental rights order entered in this case. We affirm.

BACKGROUND

¶2 M.P. is the adjudicated father of N.L.P. and M.P.P., twin girls born on July 13, 2012. The children were detained by the Bureau of Milwaukee Child Welfare (BMCW),[2] on April 25, 2013, after both were found to have healing fractures: N.L.P. had a healing fracture to her right femur that was likely several weeks to months old, and M.P.P. had a healing fracture to her right tibia that was weeks old. The examining doctor stated that the injuries were inconsistent with those that would occur by falling, but the parents were "unable or unwilling to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The Bureau of Milwaukee Child Welfare (BMCW) has since been renamed The Division of Milwaukee Child Protective Services. Since the agency was still the BMCW at the time of these proceedings, all references will be to the BMCW.

explain the injuries." Additionally, both girls were diagnosed as failing to thrive, because they were eight months old and weighed only nine and eleven pounds.

¶3 At the time they were detained, the girls were living with their biological mother, S.N.N.[3] After having "stepped out for a few months," M.P. had moved into the same duplex as S.N.N. a few months before the girls were detained by BMCW and had gotten involved with their care. S.N.N., who had four other children at the time this matter was commenced, has had numerous referrals to BMCW since 2008 relating to her parenting skills, and there were further allegations at the time of the detention of N.L.P. and M.P.P. that S.N.N. had left all of her children unsupervised (the oldest was seven years old at the time, and the twins were infants) despite a history of her oldest child "physically hurting his sisters, sexually assaulting them and setting fires in the home." Moreover, M.P. had two of his other children placed with him at the time of the twins' detention and "struggle[d] to meet their needs on a regular basis."

¶4 Consequently, the twins were placed in foster care. A Child in Need of Protection and Services (CHIPS) dispositional order was filed on January 24, 2014, which set conditions that were to be met by M.P. and S.N.N. before the twins would be allowed to return home. These conditions included participating in services offered through BMCW such as parenting education and individual therapy. M.P. was also to have supervised visitation with the twins.

[3] The parental rights of S.N.N. were also terminated and are the subject of separate appeals, *see* ***State v. S.S.N.***, Nos. 2016AP2102 and 2016AP2103. They are not at issue in the current proceeding.

¶5 M.P. failed to satisfactorily meet these conditions. M.P. was inconsistent with his attendance for the girls' medical and therapy appointments. He was also inconsistent with attending scheduled visits with the girls. Furthermore, when unsupervised visits were commenced, M.P.P. developed a fear of stairs and N.L.P. developed a stutter, and therefore the visits returned to being supervised. Overall, M.P. was noted as being "cooperative with the BMCW and its providers" and was able to "verbalize plans to monitor his daughters' needs and keep them safe," but was "often unable to follow through."

¶6 As a result, a Petition for the Termination of Parental Rights (TPR) of M.P. for N.L.P. and M.P.P. was filed on August 14, 2015. In the petition, the State alleged two grounds for termination: (1) continuing need of protection and services, pursuant to WIS. STAT. § 48.415(2); and (2) failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6). M.P. waived his right to a jury trial for the grounds phase of the proceedings, instead opting for a court trial.

¶7 The trial was held in March 2016 and lasted four days. The trial court did not immediately render a decision on the matter so that it could review all of the evidence, subsequently ruling on April 18, 2016 that there was jurisdiction as to both grounds set forth in the TPR petition. The proceedings then moved on to the dispositional phase, where the trial court considered all of the relevant factors relating to termination as required by WIS. STAT. § 48.426(3). Ultimately, the trial court found that it was in the best interests of N.L.P. and M.P.P. that the parental rights of M.P. be terminated, effective May 10, 2016.

¶8 M.P. filed a notice of appeal, but subsequently filed a motion to remand the matter back to the trial court for a hearing on his claim of ineffective assistance of counsel. M.P. claimed that his trial attorney was ineffective for

failing to object to the admission of evidence regarding the foster parents' intent to allow visits between M.P. and the twins to continue after the termination of his parental rights. He argued that such a promise is illusory and non-binding, and therefore of no probative value.

¶9 This court granted M.P.'s motion and remanded the case to the trial court for post-disposition proceedings.[4] After taking testimony on the issues over several days, the trial court issued a written decision on July 12, 2017, denying M.P.'s motion. The court found that "consideration of post-TPR contact is appropriate under established case law," and thus any objection by counsel to the testimony relating to the foster parents' intent would not have been successful. Because failing to object to permitted testimony does not constitute deficient performance on the part of trial counsel, the court ruled that M.P. had not established that he had received ineffective assistance of counsel. We then resumed jurisdiction over this appeal.

DISCUSSION

¶10 The sole issue on appeal is the argument M.P. raised in his motion for remand: that his trial counsel was ineffective for failing to object to testimony regarding the foster parents' intent to allow visits between M.P. and the twins to continue after the termination of his parental rights. M.P. asserts that such statements "are improper because they are not enforceable, are illusory, [and] are subject to possible manipulation." M.P. further contends that the consideration by the trial court of such evidence "allow[s] the court to avoid its statutory duty to

[4] S.N.N. also filed a post-dispositional motion, which was remanded to the trial court as well and heard by the court in conjunction with M.P.'s motion. It was also denied.

determine '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,'" pursuant to WIS. STAT. § 48.426(3)(c).

¶11 To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's performance was deficient and that the deficiency prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must show that counsel's actions or omissions were "professionally unreasonable." ***Id.*** at 691. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. However, if a defendant fails to prove either of these two prongs, the court need not consider the other. ***Id.*** at 697. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶12 Whether the termination of parental rights is in the best interests of a child is a discretionary decision of the trial court. ***In re Michael I.O.***, 203 Wis. 2d 148, 150, 551 N.W.2d 855 (Ct. App. 1996). As part of that determination, the trial court is required under WIS. STAT. § 48.426(3) to consider all of the factors set forth therein. The third factor, which is set forth at subsection (c) and is the factor at issue in this case, has previously been interpreted by our supreme court in ***State v. Margaret H.***, 2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475.

¶13 In ***Margaret H.***, the trial court had dismissed a TPR petition for twin boys whose mother had abandoned them shortly after birth, but whose maternal grandmother had taken over their care. ***Id.***, ¶3. The twins were removed from the

grandmother's home and were placed in a series of foster care placements; however, the grandmother was still considered an option for permanent placement of the twins if she was able to secure suitable housing. ***Id.***, ¶¶4-5. These continuing efforts by the grandmother, as well as the trial court's finding that there was a substantial relationship between the twins and their grandmother that would be harmful to the twins if severed, were the primary bases for the trial court's dismissal of the TPR petition. ***Id.***, ¶10.

¶14 This court then reversed that decision and remanded it back to the trial court, finding that the trial court had failed to consider all of the requisite factors set forth at WIS. STAT. § 48.426(3). ***Margaret H.***, 234 Wis. 2d 606, ¶12. However, specific to subsection 3(c), this court stated that there was no evidence that the relationship between the twins and their grandmother would be severed upon termination of parental rights and subsequent adoption by their current foster parent, based on evidence in the record that the foster parent had declared her intent to continue contact between the twins and their birth family. ***Id.***, ¶23. This court therefore concluded that the trial court's determination that the twins' relationship with their birth family would be severed upon termination was clearly erroneous. ***Id.***

¶15 Our supreme court rejected this court's interpretation of WIS. STAT. § 48.426(3)(c). It found that we had erroneously "approached the issue as a question of fact and concluded that because the evidence contained in the record did not reveal an actual severance, the [trial] court's conclusion was 'on its face, wrong.'" ***Margaret H.***, 234 Wis. 2d 606, ¶25. The supreme court stated that the interpretation of this court would "severely limit[] the [trial] court's discretionary authority to determine whether the termination of parental rights lies in the best interest of the child," and further, that this interpretation would have the effect of

precluding the trial court "from considering the adverse effects stemming from the dissolution of the legal rights and duties of the birth family." ***Id.***, ¶27.

¶16 Put another way, the supreme court explained that WIS. STAT. § 48.426(3)(c) "requires only that the [trial] court examine the impact of a legal severance on the broader relationships existing between a child and his or her family" as opposed to mandating that the trial court consider specific statements made by foster families or prospective adoptive families. ***Margaret H.***, 234 Wis. 2d 606, ¶29. In other words, it is within the trial court's discretion to consider a "good faith promise" made by a foster parent regarding continued visitation, but the trial court "should not be bound to hinge its determination on that legally unenforceable promise." ***Id.***, ¶30. Therefore, the supreme court held that the trial court "may certainly choose to examine the probability that [the twins' foster parent] will be faithful to her promise, at the same time bearing in mind that such promises are legally unenforceable once the termination and subsequent adoption are complete." ***Id.***

¶17 Notwithstanding M.P.'s request that we find the holding in ***Margaret H.*** to be erroneous, we construe this decision as a clear directive by our supreme court regarding the consideration of statements by foster parents. In fact, the supreme court utilized the crux of M.P.'s argument—that by their nature foster parents' statements of post-termination intent are illusory, unenforceable, and subject to change—in explaining why this court's interpretation of WIS. STAT. § 48.426(3)(c) was erroneous since it in essence required the trial court to consider them. *See* ***Margaret H.***, 234 Wis. 2d 606, ¶28. Rather, the supreme court concluded that any consideration of such statements is encompassed in the trial court's discretionary power in deciding TPR cases. ***Id.***, ¶30.

¶18 M.P. focuses particularly on a statement in ***Margaret H.*** where the supreme court stated that "[i]n its discretion, the [trial] court may afford due weight to an adoptive parent's stated intent to continue visitation with family members, although we cannot mandate the relative weight to be placed on this factor." ***Id.***, ¶29. M.P. asserts that this is dicta and should have no bearing on our determination of this issue; in fact, M.P. argues that this statement is contrary to the holding of ***Margaret H.*** with regard to the illusory nature of any promises made by adoptive parents during a TPR proceeding.¶18

¶19 We disagree with M.P.'s assessment. As stated above, the supreme court recognized that these types of statements are illusory, and thus should be considered under the trial court's broad discretion. Although the supreme court suggested that affording due weight consideration may be appropriate for such statements, it also specifically stated that it could not mandate such a directive. ***Id.*** Furthermore, the trial court in this case did not indicate that it applied any certain weight to its consideration of the testimony regarding the foster parents' intent regarding visitation, and therefore that is not an issue before this court. Rather, the trial court's consideration of the foster parents' purported intent-indeed, of all the relevant factors-falls under the trial court's discretionary umbrella

¶20 Therefore, because our supreme court has already essentially rejected M.P.'s argument, it fails. As a result, M.P.'s trial counsel was not ineffective for failing to pursue an ineffectual argument. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Accordingly, we affirm the decision of the trial court to terminate M.P's parental rights of N.L.P. and M.P.P.

By the Court.—Orders affirmed.

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